82-414

No.

Office - Supreme Court, U.S.
FILED
SEP 7 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1982

JOHN DEMJANJUK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

JOHN W. MARTIN, *Counsel of Record*
SPIROS E. GONAKIS
1949 East 105th Street
Suite 207 Call & Post Building
Cleveland, Ohio 44106
(216) 795-1515
Attorneys for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTIONS PRESENTED[1]

1. Is the right of a jury trial available to a denaturalization defendant?

2. Should the Sixth Amendment be expanded to meet the new dangers created by the investigation and prosecution of "Nazi Collaborator Denaturalization Cases"?

3. Should government witnesses, especially eyewitness identification witnesses, be compelled to personally confront a defendant in "Nazi Collaborator Denaturalization "cases", rather than simply appearing via video tape?

4. Should documents or copies of documents from foreign countries be admitted into evidence if (a) such copies are not properly certified in accordance with the Rules of Evidence, and (b) such documents fail to meet any of the exceptions to the hearsay provisions of the Rules of Evidence?

5. Does a defendant in a "Nazi Collaborator Denaturalization" case have the right to have counsel present at all post-complaint identification procedures?

6. Does a trial court have the duty to consider, and a defendant in a "Nazi Collaborator Denaturalization" case the right to present, qualified expert evidence regarding the photographic identification procedures used by the government?

---

1. Over 30 denaturalization and related proceedings have been brought against alleged war criminals between 1977 and 1981, and more than 200 others are under investigation. All the cases are prosecuted by a special arm of the Justice Department known as the Office of Special Investigations. As a result, the issues raised in this case have been raised in other cases and will continue to be raised as more of these matters are brought to trial.

7. Should an eyewitness identification be considered per se unreliable where the photospread and attendant procedures employed are unnecessarily suggestive, and the time between the event and the confrontation is extreme?

8. Should the trial court grant a new trial where among other things, the moving party establishes that given the opportunity to fully explore newly discovered evidence, the outcome of the case may in fact be different?

9. Should this Court establish rules and guidelines to assure defendants in "Nazi Collaborator Denaturalization Cases" due process of law before more of these matters are tried?

TABLE OF CONTENTS

Questions Presented 1
Opinions Below 1
Jurisdiction 1
Constitution, Statutes and Rules Involved 2
Statement of the Case 2

Reasons for Granting the Writ—

I. The Lower Court Ruling That a Denaturalization Defendant Is Not Entitled to a Jury Trial, Is a Question of Substantial Constitutional Import Which Should Be Decided by This Court 4

(A) The Fifth Amendment - Due Process of Law 4

(B) Article III, §2 and the Sixth Amendment 7

(C) Equal Protection of Law 10

(D) The Seventh Amendment 11

II. The Lower Court Ruling That the Government Need Not Provide the Petitioner With the Necessary Costs of Litigation Is in Conflict With Prior Sixth Amendment Decisions of This Court 13

III. The Determination of Standards for Permitting Video Tape Deposition Testimony at Trial in Lieu of the In-Court Appearance of a Witness Under the Facts and Circumstances of Cases Such As This Raises Important Questions of Federal Law Which Ought to Be, but Have Not Been, Decided by This Court 16

IV. The Determination of Standards for Admitting Documents and Copies of Documents From Foreign Countries Pursuant to the Rules of Evidence Raises Important Issues of Federal Law, Which Ought to Be, but Have Not Been, Decided by This Court 18

V. Whether a Defendant Is Denied Due Process of Law, Under the Facts and Circumstances of Cases Such As This, When Post-Complaint Identification Procedures Are Conducted Outside the Presence of Defense Counsel, Is a Matter of Substantial Constitutional Import That Should Be Decided by This Court 22

VI. The Determination of Standards for the Admission of Expert Testimony Concerning Photographic Identification Procedures in Cases Such As This Presents Issues of Federal Law Which Should Be Decided by This Court 27

VII. The Determination of Standards for Determining Whether a Photospread and the Attendant Identification Procedures Employed Is Unnecessarily Suggestive and Ultimately Unreliable in Cases Such As This Is a Question of Substantial Constitutional Import Which Should Be Decided by This Court 29

VIII. The Lower Court Ruling That the Petitioner Was Not Entitled to a New Trial Where Newly Discovered Evidence, If Given the Opportunity to Be Fully Explored, Could Clearly Alter the Outcome of the Case, Presents an Important Question of Federal Law Which Should Be Decided by This Court 31

(A) The Failure of the Government to Provide the Petitioner With the Affidavit of Chaim Sztajer 31

(B) The Failure of the Government to Provide the Petitioner With the Names and and Statements of Five Potential Soviet Witnesses 35

(C) Need for a New Trial 37

IX. The Determination of Rules and Guidelines Must Be Provided by This Court in Order to Assure the Defendants in These "Nazi Collaborator Denaturalization Cases" Due Process of Law 37

Conclusion 40

Appendix A - Opinion of the United States Court of Appeals, Sixth Circuit A1

Appendix B - Decision and Order of United States District Court A4

Appendix C - Constitutional Provisions, Statutes, and Rules:

Constitution of the United States:

Article III, Sec. 2 ..... A58
5th Amend. A58
6th Amend. A59
7th Amend. A59
14th Amend. A59

8 U.S.C. 1251 (a) A60
8 U.S.C. 1253 (h) A72

Federal Rules of Civil Procedure:

Rule 26(e) A73
Rule 59(a) A73

Federal Rules of Evidence:

Rule 103 ..... A74
Rule 902 ..... A75

TABLE OF AUTHORITIES

Cases

Argersinger v. Hamlin, 407 U.S. 25 (1972) 13
Banco de Espana v. Federal Reserve Bank, 114 F.2d 438 (2d Cir. 1940) 19
Baumgartner v. United States, 322 U.S. 665 (1944) 6, 11
Bell v. Wolfish, 441 U.S. 520 (1979) 8
Berger v. United States, 295 U.S. 78 (1935) 14
Brady v. Maryland, 373 U.S. 83 (1963) 14
Chaunt v. United States, 364 U.S. 350 (1960) 5, 6
Curtis v. Loether, 415 U.S. 189 (1974) 11
Dimick v. Schiedt, 293 U.S. 474 (1935) 12
Durkin v. Pet Milk Co., 14 F.R.D. 385 (D.C. Ark. 1953) 34
English v. Mattson, 214 F.2d 406 (5th Cir. 1954) 37
Galloway v. United States, 319 U.S. 372 (1943) 6, 7
Gebhard v. Isbrandtsen Co., 10 F.R.D. 119 (D.C. N.Y. 1950) 34
Gideon v. Wainwright, 372 U.S. 335 (1963) 13
Griffin v. Illinois, 351 U.S. 12 (1956) 16
Jiminez v. Weinberger, 417 U.S. 628 (1974) 10
Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) 7, 8, 9, 10
Klapprott v. United States, 335 U.S. 601 (1949) 8, 10
Knauer v. United States, 328 U.S. 654 (1946) 11
Linnas v. United States, United States Supreme Court, Writ of Certiorari, Case No. 81-2336 22
Mathews v. Eldridge, 424 U.S. 319 (1976) 5, 6
Neil v. Biggers, 409 U.S. 188 (1972) 30

Ng Fung Ho v. White, 259 U.S. 276 (1922) 4, 5, 7
Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) 7, 11
Powell v. Alabama, 287 U.S. 45 (1932) 13
Schneiderman v. United States, 320 U.S. 118 (1943) 5, 10
Singer v. United States, 380 U.S. 24 (1965) 5
State v. Manuel, 20 N.C. 20 (1838) 12
United States v. Ash, 413 U.S. 300 (1973) 13, 14, 23, 24, 25, 26, 38
United States v. Fedorenko, 455 F. Supp. 893 (S.D. Fla. 1978) *rev'd on other grounds*, 449 U.S. 490 (1981) 17, 27, 29, 30, 40
United States v. IBM Corp., 83 F.R.D. 92 (D.C. S.D. N.Y. 1979) 34
United States v. Kairys, United States District Court for the Northern District of Illinois, Eastern Division, Case No. 80-C-4302 15
United States v. Perea, 458 F.2d 535 (10th Cir. 1972) 37
United States v. Telfaire, 469 F.2d 552 (D.C. App. 1972) 27
United States v. Wade, 388 U.S. 219 (1967) 1 26
United States v. Walus, 616 F.2d 283 (7th Cir. 1980) 28, 29, 40
United States v. Williams, 571 F.2d 344 (6th Cir. 1978) 19
United States v. Wong Kim Ark, 169 U.S. 649 (1898) 12
Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) 10

United States Constitution

Article III, §2 .....7, 8, 10
Fifth Amendment 4, 10
Sixth Amendment 7, 8, 10, 13
Seventh Amendment 11, 12
Fourteenth Amendment 10

Statutes

8 U.S.C. §1425(a) 9
8 U.S.C. §1451(a) 2, 9
8 U.S.C. §1451(g) 9

Rules

Fed. R. Civ. P.:

Rule 26(e) 32
Rule 59(a) 31

Fed. R. Ev.:

Rule 902 ..... 18, 19

Other Authorities

BLACKSTONE'S COMMENTARIES ON THE LAW OF ENGLAND (1769) 12

BORCHARD, CONVICTING THE INNOCENT (1932) 27

Comment, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969, 1006 n.173 (1977) 27

Comment, *Pre-Statutory Denaturalization*, 35 CORNELL L.Q. 120 (1949) 9

FRANK AND FRANK, NOT GUILTY (1957) 27

FRANKFURTER, THE CASE OF SACCO AND VANZETTI (1927) 27

Gorphe, *Showing Prisoners to Witnesses for Identification*, 1 AM. J. POLICE SCI. 79 (1930) 27

Hearings Before the Subcommittee on Oversight of The Permanent Select Committee on Intelligence, House of Representatives (February 6, 19, 1980) 21

Hogan, *Joseph Story on Juries*, 37 ORE. L. REV. 234 (1958) 12

HOUTS, FROM EVIDENCE TO PROOF (1956) 27

McGowan, *Constitutional Interpretation and Criminal Identification, 4th Annual G.B. Sherwell Lecture*, 12 WM. & MARY L. REV. 235 (1970) 27

RADIN, HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY 287 (1936) 12

Smit, *International Aspects of Federal Civil Procedure*, 61 COL. L. REV. 1031 (1961) 19

WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES, (1965) 27

Weekly Compilation of Presidential Documents, Vol. 17, No. 5 (February 2, 1981) 21

WENTWORTH AND WILDER, PERSONAL IDENTIFICATION (1918) 27

WIGMORE, EVIDENCE, Section 786(a) (3d Ed. 1940) 27

WIGMORE, THE SCIENCE OF JUDICIAL PROOF (3d Ed. 1937) 27

3 WRITINGS OF THOMAS JEFFERSON (Washington Ed.) 71 6-7

No.

In the Supreme Court of the United States

October Term, 1982

JOHN DEMJANJUK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

OPINIONS BELOW

The opinion of the District Court is officially reported at 518 F. Supp. 1362 (D.C. Ohio 1981), and is set forth in Appendix (hereinafter "Appx.") B, *infra*, p. A4.

The summary affirmance of the Court of Appeals (Kennedy, Martin, and Phillips, JJ.) (Appx. A, *infra*, pp. A1) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 8, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The relevant constitutional provisions, statutes and rules involved herein are set forth as Appendix C, p. A58.

STATEMENT OF THE CASE

1. On August 25, 1977, the United States of America commenced an action in the District Court, pursuant to 8 U.S.C. §1451(a), to revoke petitioner's Certificate of Naturalization and vacate the order admitting him to citizenship. The basis for this action was a complaint alleging that the petitioner had served Nazi Germany during World War II as a concentration camp guard in Poland, and that the petitioner, upon entry into the United States in 1952, concealed such service from the immigration authorities.

2. Petitioner's answer denied these allegations and a jury trial was demanded. The District Court struck the jury demand upon motion of the government.

3. On two occasions, prior to trial, the petitioner moved the District Court for the government to provide the petitioner with the necessary costs of litigation. On both occasions, the motion was overruled.

4. Also prior to trial, the government, over the objection of the petitioner, was permitted to take the video tape depositions of three government witnesses. The District Court, at trial, permitted the use of such video tape depositions in lieu of the witnesses' appearance in court.

5. At trial, the evidence against the petitioner consisted of basically two types: (a) foreign documents and (b) eyewitness photographic identification testimony.

(a) The primary piece of documentary evidence offered by the government was GX 5 and 6, which was commonly referred to throughout the proceedings as the Trawniki Training Card. The petitioner objected to the admission of GX 5 and 6 on several grounds all of which were overruled by the trial court. Through GX 5 and 6, the government attempted to establish that the petitioner had trained at Trawniki which was a camp used by the Germans to train guards for deployment as concentration camp guards.

(b) The government also offered the eyewitness photographic identification testimony of several survivors of the Treblinka concentration camp as well as the photographic identification testimony of a German guard stationed at Treblinka. The petitioner not only objected to the photospreads and attendant procedures employed on Fifth and Sixth Amendment grounds, but also attempted to call as a witness a qualified expert in the area of photographic identifications. The District Court overruled all such objections and refused to permit the expert witness to testify.

6. After the conclusion of the trial, but prior to the rendering of a decision by the District Court, a government attorney forwarded to defense counsel, with a carbon copy to the court, a letter which stated that the government had "inadvertently" neglected to give the petitioner all the discovery he was entitled to prior to trial. The letter stated that the government had neglected to give the petitioner the names and statements of five potential Soviet witnesses. The letter also stated that the government was of the opinion that its failure to provide the petitioner with such names and statements was of no consequence in that such statements only "contain further incriminatory information and support for the government's case."

Further, after the conclusion of the trial, but prior to the rendering of a decision by the District Court, the petitioner, without the assistance of the government, discovered the affidavit of a Treblinka survivor who claimed that a denaturalization defendant from Chicago, was Ivan the Terrible from Treblinka.

Based upon the government's letter and the Treblinka survivor affidavit, the petitioner moved the District Court for a new trial. The motion was overruled.

7. The District Court ordered petitioner denaturalized and the Court of Appeals summarily affirmed that decision.

REASONS FOR GRANTING THE WRIT

I. THE LOWER COURT RULING THAT A DENATURALIZATION DEFENDANT IS NOT ENTITLED TO A JURY TRIAL IS A QUESTION OF SUBSTANTIAL CONSTITUTIONAL IMPORT WHICH SHOULD BE DECIDED BY THIS COURT.

(A) The Fifth Amendment - Due Process of Law

The petitioner's right to trial by jury follows from both ancient principles and modern understanding of the role of the jury in insuring due process of law.[2]

This Court has long recognized that proceedings like the government's against the petitioner must comport with due process. *Ng Fung Ho v. White*, 259 U.S. 276 (1922). Moreover, recently, this Court has indicated that in cases

---

2. "No freeman shall be arrested, or detained in prison, or deprived of his freehold, or outlawed, or banished, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land." W. McKechnie, Magna Carta 436 (1905).

such as these, the petitioner, in order to be assured due process, must be afforded a jury trial. In *Mathews v. Eldridge*, 424 U.S. 319 (1976) this Court set out the standard for determining whether due process requires a particular procedure:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Under the first test of *Mathews*, the government's action against petitioner threatens him with permanent loss of vital private interests; namely, his life, *Ng Fung Ho v. White, supra* at 284-85, and liberty. "The issue in these cases is. . . important to the liberty of the citizen. . . ." *Chaunt v. United States*, 364 U.S. 350, 353 (1960).

Secondly, petitioner faces the same, if not greater, risk of wrongful deprivation of his rights by government arbitrariness as he would in a criminal prosecution. The jury trial right is "intended to protect the accused from oppression by the Government. . . ." *Singer v. United States*, 380 U.S. 24, 31 (1965).[3]

---

3. In *Schneiderman v. United States*, 320 U.S. 118 (1943) at 159, this Court warned against reasoning under which "the security of the status of our naturalized citizens might depend, in considerable degree, upon the political temper of majority thought and the stresses of the times." The strong feelings behind the government's current campaign against alleged "Nazi war criminals" creates a risk that a citizen's security may be jeopardized by "the stresses of the times."

Further, no government interest outweighs the petitioner's need for a jury trial. Guaranteeing naturalized citizens right to trial by jury would impose no significant burden on the government. Any additional cost would be insubstantial in light of the issues involved. The government's interest in a marginal reduction of cost does not outweigh the petitioner's interest in the additional security which a jury trial affords.

This Court has stated that "[i]n striking the appropriate due process balance the final factor to be assessed is the *public* interest," not exclusively the government's interest as prosecutor. *Mathews v. Eldridge*, *supra* at 347 (emphasis added). The public interest calls for a broad, not narrow, reach for the jury trial right to protect all Americans' civil liberties:

> The founders of our government thought that trial of facts by juries rather than by judges was an essential bulwark of civil liberty. For this reason, among others, they adopted Article III, §2 of the Constitution, and the Sixth and Seventh Amendments. *Galloway v. United States*, 319 U.S. 372, 397 (1943) (Black, *J.*, dissenting).

Denaturalization cases peculiarly call for jury trial. They "deal with 'judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship.'" *Chaunt v. United States*, *supra* at 353, *quoting*, *Baumgartner v. United States*, 322 U.S. 665, 671 (1944). Basic principles of our democracy demand citizen involvement in judgments like these.

Citizen participation insures that the proceedings do not betray the tenets of the Republic. Thomas Jefferson wrote: "I consider trial by jury as the only anchor ever yet imagined by man which a government can be held to the principles of its constitution." 3 WRITINGS OF

THOMAS JEFFERSON (Washington ed.) 71, *quoted in, Parklane Hosiery Co. v. Shore*, 439 U.S. 322 at 343 n.10 (1979) (Rehnquist, J., dissenting) and *Galloway v. United States*, *supra* at 397, n.1 (Black, J., dissenting). Appropriately, citizen jurors should decide, in the first instance, whether a fellow-citizen loses his rights.

The public interest also necessitates that naturalized citizens enjoy the same rights as the native born. Authorizing the government to strip a naturalized citizen of "the right to have all other rights" without a jury, not only is, but appears unjust.[4] That appearance of justice strikes hardest at the millions of naturalized citizens, many of whom have made large sacrifices to become Americans.

The absence of a jury in these cases has the appearance of a legal technicality and thus offends the ordinary American's sense of fairness.

Denaturalization and deportation threaten the accused with "loss . . . of all that makes life worth living." *Ng Fung Ho v. White*, *supra* at 284. The jury trial provides an important safeguard to the accused, impinges no substantial interest of the prosecution, and promotes the public interest. Due process of petitioner thus includes a trial by jury.

(B) Article III, §2 and the Sixth Amendment

This Court has held that forfeiture of citizenship is penal and has "throughout history been used as a punishment." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) at 168 n.23. Moreover, denaturalization has consequences which "may be more grave than consequences that

---

4. The appearance of injustice is peculiarly acute in that the government could not strip native-born Americans of their citizenship without according them a jury trial. *Kennedy v. Mendoza-Martinez*, *supra*.

flow from conviction from crimes." *Klapprott v. United States*, 335 U.S. 601 (1949) at 611 (opinion of Black, *J.*) Article III, §2 and the Sixth Amendment to the Constitution therefore guarantee petitioner a jury.

When the government proceeds against an individual on a cause "essentially penal in nature," the Constitution guarantees the accused criminal procedural safeguards, including the right to trial by jury. *Bell v. Wolfish*, 441 U.S. 520, 535-40 (1979); *Kennedy v. Mendoza-Martinez*, *supra* at 164. In *Mendoza-Martinez*, *supra* at 168-69, this Court itemized the relevant considerations to determine whether a cause is "essentially penal":

> [1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as punishment, [3] whether it comes into play only on a finding of *scienter*, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it; and [7] whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face.

Under each aspect of the *Mendoza-Martinez* analysis the government's prosecution of the petitioner qualifies as "essentially penal." Moreover, *Mendoza-Martinez* identified the sanction the government seeks here—loss of citizenship—as a penalty. Denaturalization costs the individual the right to have all other rights.

Further, the government will seek to deport petitioner to either West Germany or the Soviet Union once it has denaturalized him.[5] Thus, petitioner's deportation to either country will probably mean the total loss of liberty for life or possibly the loss of life itself.

The sanctions the government seeks against petitioner have historically been regarded as punishment. In *Mendoza-Martinez, supra* at 168 n.23 the Court noted:

> [F]orfeiture of citizenship and the related devices of banishment and exile have throughout history been used as punishment.

Tracking the fourth facet of *Mendoza,* the behavior leading to the denaturalization sanction under 8 U.S.C. §1451(a) is already a crime. Title 8 United States Code, §1425 makes unlawful acquisition of citizenship a felony. Conviction under that provision automatically results in loss of citizenship. 8 U.S.C. §1451(g).

The first statute outlawing denaturalization abuses was a criminal statute. 2 Stat. 11 (1813). Moreover, until the Act of 1906, the only remedies for naturalization frauds were criminal penalties. See, Comment, *Pre-Statutory Denaturalization,* 35 CORNELL L.Q. at 121.[6]

This Court has identified no "alternative purpose" for denaturalization apart from punishment. Rather, this Court has recognized that "[d]enaturalization consequences may be more grave than consequences that flow

---

5. There can be no doubt as to the government's intention to deport the petitioner. In fact, despite the pendency of petitioner's appeal, the government has illegally attempted to commence deportation proceedings and has caused the petitioner to be unlawfully incarcerated in jail for a period of ten days.

6. In this regard, it is noteworthy that the government places the Office of Special Investigations, specially funded for these proceedings, in the Criminal Division of the Justice Department.

from conviction for crimes." *Klapprott v. United States, supra* at 611. As a result, it has progressively extended criminal procedural safeguards to defendants in denaturalization actions. *Schneiderman v. United States, supra* at 160; *Klapprott v. United States, supra* at 612.

Under this Court's standards, the sanction the government seeks against the petitioner is penal. Article III, §2 and the Sixth Amendment therefore guarantee him right to trial by jury.

(C) Equal Protection of the Law

Fifth Amendment "due process of law" also requires the Federal Government to insure equal protection of the laws.[7] As a component of due process, the guarantee of equal protection insures naturalized citizens, like the native-born, a trial by jury when the government moves to take away their citizenship.

In *Kennedy v. Mendoza-Martinez, supra,* this Court held that the Fifth and Sixth Amendments guarantee native citizens the right to jury trial when the government moves to take away their citizenship. In denying a jury-trial in denaturalization proceedings, the government is creating two classes of citizens; native born and naturalized.

This Court has repeatedly emphasized the equality of naturalized and native-born:

---

7. While the Fifth Amendment contains no equal protection clause, this Court's "approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger v. Wiesenfeld,* 420 U.S. 636, 638 n.2 (1975). See also *Jiminez v. Weinberger,* 417 U.S. 628, 637 (1974) (denial of benefits to illegitimate children "denies the former [illegitimate children] the equal protection of the laws guaranteed by the due process provision of the Fifth Amendment.")

> Citizenship obtained through naturalization is not a second-class citizenship. It has been said that citizenship carries with it all of the rights and prerogatives of citizenship obtained by birth in this country "save that of eligibility to the Presidency." *Knauer v. United States*, 328 U.S. 654 (1946) at 658. See also, *Baumgartner v. United States, supra* at 673.

Therefore, equal protection of the laws guarantees that naturalized citizens stand on equal footing with native citizens, and thus must receive the same procedural protections.

(D) The Seventh Amendment

The Seventh Amendment also bars the government from denaturalizing and deporting the petitioner without attending him a jury. The Seventh Amendment "preserve[s] the right to jury trial as it existed in 1791." *Parklane Hosiery Co. v. Shore, supra* at 333. In 1791, the government could not strip a citizen of his rights and expel him from the country without resort to a jury trial. At that time, most Americans thought their new Constitution prevented the government from taking away their rights without resort to a jury. The Revolution had, in part, been fought because the King and Parliament had violated these ancient principles.

The Seventh Amendment provides: "In Suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ." This Court stated the scope of the Seventh Amendment jury-trial right in *Curtis v. Loether*, 415 U.S. 189, 193 (1974):

> Although the thrust of the [Seventh] Amendment was to preserve the right of jury trial as it existed in 1791,

> it has long been settled that the right extends beyond the common-law forms of action recognized at that time.

The scope of the Seventh Amendment under these principles squarely covers the government's proceeding against the petitioner.

"In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791." *Dimick v. Schiedt*, 293 U.S. 474, 476 (1935). As understood on both sides of the Atlantic in 1791, the common-law guarantee of jury trial under Magna Carta covered any government effort to take a citizen's right and deport him. *See* 4 BLACKSTONE'S COMM. 343.[8]

Further, Blackstone reflected American's understanding of their common-law heritage. "There is no doubt that for many early American lawyers, Blackstone was the common law, because, for one thing, they often had no other book." RADIN, HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY 287 (1936) quoted in, Hogan, *Joseph Story on Juries*, 37 ORE. L. REV. 234 (1958).

All in all, it is apparent that the issues presented herein are of the highest magnitude. Further, as more of these Nazi Collaborator Denaturalization cases are prosecuted, the issue will keep reappearing. Accordingly, the writ should issue.

---

8. " 'The term "citizen", as understood in our law, is precisely analogous to the term "subject" in the common law, and the change of phrase has entirely resulted from the change of government. The sovereignty has been transferred from one man to the collective body of the people and he who before was a "subject of the king" is now "a citizen of the state." ' " *United States v. Wong Kim Ark*, 169 U.S. 649, 664 (1898) quoting *State v. Manuel*, 20 N.C. 20, 24-26 (1838).

II. THE LOWER COURT RULING THAT THE GOVERNMENT NEED NOT PROVIDE THE PETITIONER WITH THE NECESSARY COSTS OF LITIGATION IS IN CONFLICT WITH PRIOR SIXTH AMENDMENT DECISIONS OF THIS COURT.

Over the years this Court has continually embellished upon the English Common Law concept of assistance of counsel. *Powell v. Alabama*, 287 U.S. 45 (1932); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Argersinger v. Hamblin*, 407 U.S. 25 (1972). It has been the posture of this Court to expand the parameters of the Sixth Amendment whenever "new contexts" arise presenting the same dangers that gave birth to the right itself. *United States v. Ash*, 413 U.S. 300 (1973). The petitioner herein respectfully submits that it is time, once again, for this Court to expand the Sixth Amendment to meet the dangers presented by the vast number of cases being investigated and tried in this country and commonly referred to as the "Nazi Collaborator Denaturalization Cases."

Initially, the right to counsel arose because of the advent of professional prosecuting attorneys and modern law enforcement machinery and techniques. However, it is doubted that this Court ever contemplated that a single citizen of the United States would be confronted by a special prosecutorial staff of the Justice Department in concert with the police and prosecutorial staffs of foreign governments throughout the world.[9] As a result, the dangers of prejudice befalling the petitioner herein, and

---

9. Foreign involvement in this particular case came primarily from Israel, West Germany, and the Soviet Union. Each foreign government played an integral role in finding and interviewing potential government witnesses, conducting identification procedures, compiling documents, and providing expert witnesses to testify at trial.

defendants in similar circumstances are present in every aspect of the government's case.

> Pretrial photograph identifications, however, are hardly unique in offering possibilities for the actions of the prosecutor unfairly to prejudice the accused. Evidence favorable to the accused may be withheld; testimony of witnesses may be manipulated; the results of laboratory tests may be contrived. In many ways the prosecutor, by accident or by design, may improperly subvert the trial. The primary safeguard against abuses of this kind is the ethical responsibility of the prosecutor, who, as so often has been said, may "strike hard blows" but not "foul ones". *Berger v. United States*, 295 U.S. 78, 88 (1935); *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963); *United States v. Ash*, *supra* at 320.

But not all countries hold in high esteem the constitutional safeguards and procedures valued by our system of jurisprudence. Thus, who can say that an Israeli police officer conducting a photographic identification in Israel will abide by the standards of due process.[10] As a result, defendants in these types of cases, must be afforded some constitutional safeguard to insure that come the time for trial, they will be afforded due process of law.

Because of the very nature of these types of cases—the extreme passage of time (over 35 years), witnesses worldwide, foreign language barriers, and expert witnesses dealing with documents, photographs, historical background, and immigration procedure—unless a particular defendant is extremely wealthy, the costs of investigation and discovery are not only prohibitive but

---

10. This exact circumstance occurred numerous times. See *infra* discussion regarding photographic identification procedures.

completely unreachable. On the other hand, the only means of attempting to assure such a defendant due process of law is to place him on equal footing with the government having similar pretrial investigative and discovery opportunities.[11]

The petitioner, realizing his inability to effectively conduct pretrial investigations and discovery, moved the trial court on two occasions for the necessary costs of litigation. On both occasions, the petitioner's motions were overruled citing the fact that the petitioner was not totally and completely destitute.

Pretrial procedures may effectively determine the outcome of a matter long before trial especially where the events at issue occurred over 35 years ago. *United States v. Wade*, 388 U.S. 219 (1967). Thus, in order to assure that the trial is more than a mere formality, both parties must have equal opportunities to prepare their respective cases. This the petitioner did not have the opportunity to do. The petitioner did not have the opportunity to confront identification witnesses during the pretrial identification procedures. Nor did the petitioner have the opportunity to depose any of the government witnesses prior to trial except for those that the government chose to video tape. Nor did the petitioner have the opportunity to meaningfully confront the original of GX 5 and 6 (Trawniki Training Card) when it arrived from the Soviet Union in the midst of trial. Further, the petitioner did not have the opportunity to hire investigators to seek and question defense witnesses who resided throughout the world. And further, the petitioner did not have sufficient

---

11. At least one trial court has recognized this problem. In *United States v. Luidas Kariys*, U.S.D.C. for the N.D. of Illinois, Eastern Div. #80-C-4302 the trial court assigned a law firm with substantial financial resources, as well as manpower, to attempt to balance the inherent inequities between the litigants.

funds for the expert witnesses and interpreters needed to prepare and present his defense. Rather than both sides having an equal opportunity to present evidence and testimony, the trial evolved into a proceeding whereby he who could afford to present evidence did and he who could not, did not.

When a defendant is deprived of the necessary tools to present his defense—be it expert witnesses, investigators, transcripts or the like—the defendant is denied effective assistance of counsel and due process of law. *Griffin v. Illinois*, 351 U.S. 12 (1956). Thus, it is respectfully submitted that this Court once again meet the "new contexts" and dangers presented by these "Nazi Collaborator Denaturalization Cases." Accordingly, the writ should issue.

III. THE DETERMINATION OF STANDARDS FOR PERMITTING VIDEO TAPE DEPOSITION TESTIMONY AT TRIAL IN LIEU OF THE IN-COURT APPEARANCE OF A WITNESS, UNDER THE FACTS AND CIRCUMSTANCES OF CASES SUCH AS THIS, RAISES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH OUGHT TO BE, BUT HAVE NOT BEEN, DECIDED BY THIS COURT.

In February, 1980, the government requested and was permitted to conduct video tape depositions of Otto Horn and Heinrich Schaefer in West Germany.[12] Thereafter, in January, 1981, the government, once again, was permitted to take a video tape deposition of International Refugee Organization expert, Daniel Segat, in New York

---

12. In West Germany, the government had at their disposal U.S. Army personnel from the Armed Forces Network to man cameras for the video depositions.

City. The petitioner objected to such video taping at the time the government made the initial requests with the trial court as well as at trial. All objections were overruled.

As to the two West Germans, the government claimed that their appearance in the trial court may prove embarrassing and cause them to lose their privacy. The prospect of a witness losing his privacy and facing public embarrassment is no excuse for his nonappearance at trial.

As to Segat, the government claimed that Segat would be unavailable for the trial. This excuse is as lame as that tendered for the two West Germans. The government had over three years to line up its witnesses for this trial. In three years the government should be able to arrange for a witness' appearance in court.

The similarities between the instant lawsuit and a criminal trial are inescapable. Although the instant matter is technically a suit in equity, using the civil rules, the ramifications are totally criminal. Although the petitioner may not be afforded all the rights afforded a criminal defendant, the petitioner must be afforded due process of law. Certainly, fairness and equity dictate, at the very least, that all witnesses, especially eyewitnesses such as Horn, must confront the defendant in open court. As Judge Roettger stated in *United States v. Fedorenko*, 455 F. Supp. 893, 897 (S.D. Fla. 1978), *reversed on other grounds*, 449 U.S. 490 (1981).

> Early in November, 1977, the court learned of the government's intention to take depositions out of the country. Because it was concerned that the government might intend to produce only deposition testimony of foreign witnesses, the court sua sponte entered an order prohibiting the use of deposition tes-

timony at trial in order to enable the court to observe the witnesses' faces, body language and reactions in the courtroom, particularly in the presence of the defendant and also his reactions to their testimony. The court felt that in-court testimony would be particularly critical in view of the passage of 35 years since the events complained of at Treblinka.

The same reasoning is equally applicable to the case at bar. Therefore, it is respectfully submitted that this Court establish some firm guidelines for the admission of video tape testimony, especially in cases which deal with the taped eyewitness testimony relating events over 35 years prior. Accordingly, the writ should issue.

IV. THE DETERMINATION OF STANDARDS FOR ADMITTING DOCUMENTS AND COPIES OF DOCUMENTS FROM FOREIGN COUNTRIES PURSUANT TO THE RULES OF EVIDENCE RAISES IMPORTANT ISSUES OF FEDERAL LAW, WHICH OUGHT TO BE, BUT HAVE NOT BEEN, DECIDED BY THIS COURT.

Although the trial court, in its opinion, failed to state the precise grounds for the admission of GX 5 and 6[13] into evidence, the petitioner is under the impression that the trial court was of the opinion that the copies of the Trawniki Training Card satisfied Rule 902 of the Rules of Evidence and as a result became automatically admissible. If so, this is clearly erroneous. Even if Rule 902 is satis-

---

13. GX 5 and 6 are copies of the front and back of the document commonly referred to throughout the trial as the Trawniki Training Card. The document purports to be an official Nazi identification card issued to concentration camp guards and in this particular instance issued to one named Ivan Demjanjuk. The card contains among other things, biographical data and an alleged photograph of the bearer. The documents were attested to by an official of the Soviet Union.

fied,[14] such documents are nevertheless inadmissible unless they fall within an exception to the hearsay rule.

The touchstone to the admission of hearsay evidence is the trustworthiness of the evidence offered. *United States v. Williams*, 571 F.2d 344 (6th Cir. 1978). Therefore, prior to the admission of any hearsay evidence, pursuant to any hearsay exception, the offering must establish that the evidence is in fact trustworthy. As to GX 5 and 6, the government failed to do this.

From the outset, the trustworthiness of GX 5 and 6 are clouded by the fact that no one who testified at trial had ever seen a similar card.[15] Further, the government in response to a certain interrogatory question propounded by the petitioner stated that GX 6 was the only document of such type ever prepared by the supply room at Trawniki.

Further, the method of circumstances of preparation of GX 5 and 6 do not lend credence to the truthworthiness of the document. The document was allegedly prepared in the midst of World War II in conjunction with a covert

---

14. The petitioner never conceded that GX 5 and 6 satisfied Rule 902. In fact, it is apparent that Rule 902 can never be satisfied where an official of one foreign country (Soviet Union) attests to a document prepared by another foreign government (Nazi Germany). See Smit, *International Aspects of Federal Civil Procedure*, 61 COL. L. REV. 1031, 1060-61 n.131, 1062, 1065 (1961). "The faith placed in certified copies of official records . . . is based . . . upon the assumption that the oath and certificate of the custodian may reasonably be relied upon." *Banco de Espana v. Federal Reserve Bank*, 114 F.2d 438, 446 (2d Cir. 1940). If the custodian is from another country such an assumption becomes meaningless.

15. In fact, Dr. Wolfgang Scheffler, a West Berlin historian called by the government as an historical expert during the Nazi years, was unquestionably of the opinion that GX 5 and 6 were two separate and distinct documents. But when the original document surfaced in the midst of trial, Dr. Scheffler was found to be unquestionably wrong.

operation known as Action Reinhard, namely: the systematic extermination of the European Jews. The operation was run by the clandestine German SS. Further, the only person alive that could have shed some light on the preparation and trustworthiness of the Trawniki Training Card, Karl Streibel, the former commander of Trawniki, was never brought forth by the government to testify.[16]

And finally, we must look to the custodian of the document, the Soviet Union. The government theorized that the Trawniki Training Card was captured by the Russians in their westward drive toward Berlin. Then, for some reason, the Soviets filed the document away in one of their archives for over thirty years only to have the card surface to be used in the prosecution of a person who to this day the Soviet Union considers a traitor. Can we trust the custodian of this document, especially where the custodian fails to testify?

First, how did the Soviets actually come into possession of this document? This question was never answered. Nor was it ever established how the Soviets could capture the identification card without capturing the bearer of the card. Moreover, if the Soviets had the card in 1948, and had not captured the bearer, why did they not supply the name on the card to the Allies so that his name would appear on the collaborator lists. According to the undisputed testimony of Ed O'Connor, the Soviets supplied names for these lists through 1950. And finally, if this

---

16. In May, 1980, defense counsel traveled to Hamburg, West Germany in order to cross-examine Streibel at a deposition called by the government, but for some unexplained reason, Streibel did not appear for the deposition. Defense counsel submitted an affidavit to the trial court stating that, "On May 8, 1980, I spoke with Streibel on the telephone, through the services of an interpreter, and was advised by Karl Streibel that at about 9:00 a.m. on May 8, he received a telephone call that the deposition had cancelled."

document is truly truthworthy, why was the original only produced by the Soviets in the midst of trial, and why did the Soviets not permit any testing upon the original to determine its date of origin.

Can we trust a country that since World War II has been our most severe critic and staunchest opponent in providing our courts with reliable documents? Can we trust a government that declares all people of Russian heritage to be Soviet citizens? Can we trust a government that has persecuted Ukranians beyond the Iron Curtain?[17]

The only conclusion that can be reached is that such documents provided by the Soviet Union are untrustworthy until proven otherwise by the government. This the government did not do in the instant matter.

Furthermore, the issues surrounding the admission and trustworthiness of documents from less than trustworthy foreign regimes is bound to crop up time and again

---

17. President Reagan in answering questions at a news conference on January 29, 1981, stated unequivocally that he was of the opinion that the Soviet government would commit any crime, lie and cheat, to achieve their international revolutionary goals. Weekly Compilation of Presidential Documents, February 2, 1981, Vol. 17 - No. 5 at 66-67. Also see, Hearings Before the Subcommittee On Oversight of The Permanent Select Committee on Intelligence; The House of Representatives, re: Soviet Covert Action, February 6, 19, 1980, where in the Appendix at page 63 thereto is a CIA Study which notes:

"Documentary forgeries, which contain false, misleading or incomplete information, may be fabricated out of whole cloth or they may be altered versions of genuine documents and official forms which have been obtained by Soviet espionage agents. In both cases, the Soviets use such forgeries in elaborate deception games with the governments, media, and people of their leading adversaries. Anti-U.S. Government forgeries always convey implicitly or explicitly a false or distorted message about U.S. foreign policy intentions and actions, and they are designed to influence their intended recipient ("the victim") to reach conclusions or take actions which the forger believes will serve his own interest while undermining those of his opponent ("the enemy"). Depending upon their content, documentary forgeries

(Continued on following page)

as more of these "Nazi Collaborator Denaturalization Cases" are tried.[18] Accordingly, the writ should issue.

V. WHETHER A DEFENDANT IS DENIED DUE PROCESS OF LAW, UNDER THE FACTS AND CIRCUMSTANCES OF CASES SUCH AS THIS, WHEN POST-COMPLAINT IDENTIFICATION PROCEDURES ARE CONDUCTED OUTSIDE THE PRESENCE OF DEFENSE COUNSEL, IS A MATTER OF SUBSTANTIAL CONSTITUTIONAL IMPORT THAT SHOULD BE DECIDED BY THIS COURT.

On August 25, 1977, the government filed the complaint in the instant matter with the District Court. Of the six government witnesses whose testimony was heard regarding out-of-court photographic identification of the

---

Footnote continued—

may have a political, military, economic or counterintelligence slant; in practice most of them—and all of those discussed today—have a political purpose.

Forgeries may also be classified according to their intended recipient or victim. One type is aimed at misleading foreign government leaders and opinion-makers, thereby warping the decisionmaking process in the target country. Technically speaking, this is the "disinformation" or misinformation type of forgery; it is normally surfaced by "agents of influence" with access to higher government circles in the target country and almost never receives public attention. A second type of forgery, which may be called the propaganda forgery, is directed at molding public opinion in the target country or countries. It is usually planted surreptitiously in the foreign media in such a way that the Soviet hand is not revealed. After it has received sufficient replay in the non-communist media, the forgery is then almost always exploited by Soviet propagandists to support unsubstantiated allegations made in the official media which would otherwise appear spurious and unconvincing without "documentary" evidence to back them up.

18. The question of foreign documents supplied by an untrustworthy regime is presently before this Court on Petition for Writ of Certiorari in *Karl Linnas v. United States.* (United States Supreme Court Case No. 81-2336).

petitioner, or of a photograph alleged to be that of the petitioner,[19] only one witness, Elijahu Rosenberg, made a photographic identification prior to the filing of the complaint.

After the filing of the complaint, the remaining five identification witnesses viewed various photospreads for the first time. In addition, Rosenberg also viewed another photospread after the filing of the complaint. Four of the six witnesses made their photographic identifications in Israel under the direction of Israeli police investigators. One witness made his photographic identification in West Germany and the other in New York City, both under the direction of United States government investigators.

At trial, the government relied exclusively upon out-of-court photographic identifications by its witnesses to attempt to prove the identity of the person alleged to be Iwan the Terrible from the Treblinka Death Camp. None of the witnesses attempted an in-court identification. The defense objected to the testimony of each and every witness regarding their out-of-court photographic identifications.

Although it has been held that a criminal defendant does not have the absolute right to have defense counsel present at a post-indictment photographic identification procedure, *United States v. Ash, supra,* cases such as *Ash* and other Sixth Amendment and due process decisions of this Court strongly suggest that under extraordinary facts and circumstances due process requires the presence of defense counsel at post-complaint identification procedures.

---

19. All the photospreads used at trial contained either the visa photograph of the petitioner or the Trawniki Training Card photograph from GX 6 which was alleged to be a photograph of the petitioner.

The basic reason for the initiation of rules requiring the presence of defense counsel at certain stages of a prosecution is a "desire to minimize the imbalance in the adversary system that otherwise resulted with the creation of a professional prosecuting official." *United States v. Ash, supra* at 309. Thus, where "new contexts" appear which present the same dangers which initially gave birth to the necessity of defense counsel's presence at post-complaint proceedings, the parameters of the rule must likewise expand to encompass such new and unique situations. *United States v. Ash, supra* at 311. Thus, the question presented is not whether due process absolutely or does not absolutely require defense counsel to be present at all post-complaint photographic identification procedures, but rather under the extraordinary facts and circumstances of the instant case, whether due process requires the presence of defense counsel at post-complaint photographic identification procedures.

In looking to the extraordinary facts and circumstances surrounding this case, it is apparent that this type of case presents "new contexts" in which due process requires the presence of defense counsel at post-complaint identification procedures. First, as gave birth to the rule requiring defense counsel present at certain stages of a judicial proceeding, the government has created and maintains a special office which is staffed and financed to handle matters dealing exclusively with the denaturalization of suspected World War II Nazi war criminals. Further, the network of the government's special office goes beyond the manpower and resources available to them in the United States. The network encompasses American manpower throughout the globe and the zealous cooperation of foreign governments. This international network is very evident in the instant case. Participation of the

Israeli, West German and Soviet Government is readily apparent, while the cooperation of other foreign governments, while not as evident, is nevertheless present. Obviously, a single individual defendant who has been employed in a factory for 30 years cannot compete with such an international conglomerate of manpower and financial resources.[20] Moreover, absent the petitioner's inability to conduct effective discovery, the petitioner, even if he possessed the necessary finances, could not compel any foreign citizens to be deposed or appear for trial.

But the question remains, how does the petitioner's inability to compete with the government in the pretrial preparation of the lawsuit or in bringing witnesses to the courtroom for trial bear upon the pretrial photographic identification procedures and due process. In *United States v. Ash*, *supra*, this Court held that the usual criminal defendant is not entitled to have defense counsel present at post-indictment photographic displays because two safeguards usually ensure the detection, at trial, of unfair photographic proceedings. The safeguards are: (1) defense counsel's ability to reconstruct the photographic identification procedure, and (2) the ethical responsibility of the prosecutor in overseeing the photographic identifi-

---

20. This is clearly illustrated by the fact that the majority of the petitioner's discovery was limited to the propounding of interrogatories. Moreover, all of the defendant's experts, with the exception of Ed O'Connor from nearby Buffalo, were from the Greater Cleveland area. By contrast, the government had experts from West Germany, Washington, D.C. California, Maryland, Georgia, and New York City, in addition to three survivor witnesses from Israel, one from West Germany, and one from Uruguay, and the two deposition witnesses in West Germany. Furthermore, while the petitioner was unable to depose any of the government's witnesses, the government deposed all of the petitioner's witnesses, including the petitioner on two occasions, and Dr. Detterman, who did not testify at trial. The only witnesses not deposed were the petitioner's reputation witnesses.

cation. *United States v. Ash, supra* at 318 and 320. In this case, the safeguards simply do not exist.

First, defense counsel had no opportunity to reconstruct the post-complaint photographic identification procedures. None of the investigators who conducted the photographic identification procedures were brought by the government to testify in court nor could the defendant subpoena such foreign investigators to testify in this country. And even if the defendant's subpoena power was available, the cost of bringing such witnesses to Cleveland, Ohio was clearly prohibitive.

> The defendant's inability to effectively reconstruct at trial any unfairness that occurred at the photographic identification procedure deprives the defendant of his only opportunity to meaningfully attack the credibility of the witness' in-court testimony as to the sureness of their out-of-court identification. *United States v. Wade, supra* at 231-232.

Thus it cannot be said that no greater limitations have been placed upon defense counsel in the instant case, "in constructing displays, seeking witnesses, and conducting photographic identifications than those applicable to the prosecution." *United States v. Ash, supra* at 318.[21]

Secondly, although the petitioner does not question the integrity of the Assistant United States Attorneys involved in the trial of this lawsuit, the fact remains that the government attorneys cannot assure this Court that

---

21. Although the government listed the investigators who conducted the photographic identification procedures in its pretrial brief as witnesses to be called at trial, they were never called by the government. The petitioner can only surmise as to their nonappearance, but their nonappearance was certainly calculated and not happenstance.

the photographic identifications conducted in Israel were done so fairly and impartially without the striking of any foul blows.[22]

For these reasons, and because tactics like these will continually be employed by the government in the prosecution of these types of cases, the writ should issue.

VI. THE DETERMINATION OF STANDARDS FOR THE ADMISSION OF EXPERT TESTIMONY CONCERNING PHOTOGRAPHIC IDENTIFICATION PROCEDURES IN CASES SUCH AS THIS PRESENTS ISSUES OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT.

Although the admission of expert testimony is subject to the sound discretion of the trial court, courts and commentators have expressed concern over the inadequacies of eyewitness identifications.[23] Further, while the identification procedures in a given case may seem on their surface to the non-expert to be unsuggestive, an ex-

---

22. Clearly this is a problem as evidenced by Judge Roettger's comments in *United States v. Fedorenko, supra* at 906 regarding the procedures adopted by the Israeli investigators conducting the photographic identification procedures. The same investigators conducted the identification procedures in this case.

23. See: Lecture by McGowan, *Constitutional Interpretation and Criminal Identification*, 4th Annual G.B. Sherwell Lecture, October, 1970, printed in 12 WM. & MARY L. REV. 235 (1970); E. BORCHARD, CONVICTING THE INNOCENT (1932); J. FRANK & B. FRANK, NOT GUILTY (1957); F. FRANKFURTER, THE CASE OF SACCO AND VANZETTI (1927); M. HOUTS, FROM EVIDENCE TO PROOF (1956); P. WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES (1965); B. WENTWORTH & WILDER, PERSONAL IDENTIFICATION (1918); J. WIGMORE, THE SCIENCE OF JUDICIAL PROOF (3d Ed. 1937); 3 J. WIGMORE, EVIDENCE SECTION 786a (3d Ed. 1940); Gorphe, *Showing Prisoners to Witnesses for Identification* 1 AM. J. POLICE SCI. 79 (1930). Comment, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969, 1006 n.173 (1977). Also see: *United States v. Telfaire*, 469 F.2d 552 (D.C. App. 1972).

pert within the area of eyewitness identification may be able to detect certain flaws within the identification procedure which reaches just the opposite conclusion.

In the instant matter, the trial court would not permit the petitioner to present the testimony of a qualified expert witness regarding the inherent bias in two of the photospreads used by the government in identification procedures. The trial court was of the opinion that it did not need any expert assistance in dealing with the photospreads.

When considering the extraordinary set of facts and circumstances presented by the instant case, and similar "Nazi Collaborator Cases," one would think that the trier of fact would welcome all relevant expert testimony to assist in deciding the issues of the case. This would seem to be especially true where the proffered expert testimony deals with identification procedures in a case which involves eyewitness identification done exclusively from photospreads over 35 years after the event has transpired. When dealing with such a situation no stone should be left unturned. The trial court has a duty as both judge and fact finder to be certain that the photospreads used by the government were as "clinically impartial as humanly possible to construct." *United States v. Walus*, 616 F.2d 283, 293 (7th Cir. 1980). The trial court in the case at bar violated that duty when it failed to permit the expert photographic identification testimony. As a result, the petitioner was denied due process of law. Accordingly the writ should issue.

VII. THE DETERMINATION OF STANDARDS FOR DETERMINING WHETHER A PHOTOSPREAD AND THE ATTENDANT IDENTIFICATION PROCEDURES EMPLOYED IS UNNECESSARILY SUGGESTIVE AND ULTIMATELY UNRELIABLE IN CASES SUCH AS THIS IS A QUESTION OF SUBSTANTIAL CONSTITUTIONAL IMPORT WHICH SHOULD BE DECIDED BY THIS COURT.

Throughout the pendency of this lawsuit, the petitioner has put forth the proposition that the photospreads and attendant procedures employed by the government were unnecessarily suggestive, and thereby conducive to an irreparable mistaken identification. The trial court did not concur with the petitioner's proposition. The difference in opinion between the petitioner and the trial court centers about what constitutes unnecessary suggestiveness under the facts and circumstances presented by Nazi Collaborator Denaturalization Cases.

The standard adopted by the petitioner was simply not pulled out of the blue as the trial court may have suspected. But rather the petitioner adopted the standards of two courts which had previously dealt with this exact problem. The appellate court in *United States v. Walus, supra* at 293 and the trial court in *United States v. Fedorenko, supra* at 906, held that the photospreads should be as "clinically impartial as humanly possible to construct" and that the attendant procedures employed be done so "under laboratory conditions." The standards adopted by the trial court in the instant matter were certainly not as stringent.[24]

---

24. This is an understatement in that GX 17 was the same photospread employed in *United States v. Fedorenko, supra*, and declared by the trial court to be unnecessarily suggestive. In GX 17 the photographs of Demjanjuk and Fedorenko are side by side on page 3.

This court has previously established the guidelines for determining whether an identification subsequently made after a suggestive identification procedure is in fact unreliable. *Neil v. Biggers*, 409 U.S. 188 (1972). The test adopted by *Biggers* is a totality of the facts and circumstances test with all factors being weighed equally. But the *Biggers* test cannot be applied in the same manner to a case where all the identifications occur 33 to 35 years after the event. One factor, simply because it is so glaring, must carry the determinative weight above all the others.

> With a time interval of 35 years, rather than days or a few weeks as in the typical criminal case, the threshold of what suggestibility becomes impermissible must necessarily be lowered. The court cannot find a decision considering the question with a time lag of many years duration. The Supreme Court did observe in *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 401 (1972) that a lapse of seven months between the event and the confrontation ". . . would be a seriously negative factor in most cases." Id. at 201, 93 S. Ct. at 383. In the instant case where there is a gap of almost 35 years between the event and the witnesses' ability to observe the suggestive photospreads, the photospread should have been as clinically impartial as humanly possible to construct. *United States v. Fedorenko, supra* at 905-906.

Therefore, where the photospreads and the attendant procedures employed are not "clinically impartial" nor conducted "under laboratory conditions", the subsequent identification must be deemed per se unreliable where the lapse of time between the event and confrontation is extreme. Therefore, so that these standards are employed in this case and in future cases of this type, the writ should issue.

VIII. THE LOWER COURT RULING THAT THE PETITIONER WAS NOT ENTITLED TO A NEW TRIAL WHERE NEWLY DISCOVERED EVIDENCE, IF GIVEN THE OPPORTUNITY TO BE FULLY EXPLORED, COULD CLEARLY ALTER THE OUTCOME OF THE CASE, PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT.

After trial, but prior to rendering of a decision by the trial court, the petitioner moved the trial court to declare a mistrial.[25] The motion was based upon three independent grounds, two of which will be discussed herein.

(A) The Failure of the Government to Provide the Petitioner With the Affidavit of Chaim Sztajer

After the conclusion of the trial, but prior to the rendering of a decision by the trial court, the petitioner, without the assistance of the government, came into possession of an affidavit given by Treblinka survivor Chaim Sztajer to the United States Counsel in Melborne, Australia in September, 1980. The affidavit reflects that Sztajer, after seeing a newspaper photograph of Luidas Kariys, a defendant in a similar case in Chicago, identified Kariys as the Iwan from Treblinka. This affidavit although made in September, 1980, and received by the government during such month, was never forwarded to the petitioner.[26]

The trial court maintains that merely because the government provided the defendant with Sztajer's name

---

25. The trial court treated the motion as a motion for new trial based upon newly discovered evidence. See Rule 59, Rules of Evidence.

26. In September, 1980, one of the government's attorneys in the Demjanjuk matter was also trial attorney of record in the *Kariys* case.

in response to an interrogatory question propounded by the petitioner which asked for names and addresses of individuals who viewed various photospreads and failed to select a photograph either of the petitioner or alleged to be of the petitioner, that the government was under no duty to supply the petitioner with Sztajer's September, 1980, affidavit. This contention is clearly at issue.

First, Sztajer's name was provided in May, 1980, when the government responded to the interrogatory question mentioned above. This was four months prior to Sztajer signing the affidavit. Therefore, even if Sztajer had been immediately contacted by defense counsel upon the disclosure of his name, the affidavit, not having been prepared, would never have been discovered. Moreover, any attempt by defense counsel to correspond with Sztajer would have been fruitless because the government provided the petitioner with an inaccurate address for him.

Secondly, the government has a duty to supplement discovery matters pursuant to Rule 26(e), Rules of Civil Procedure which provides for the supplemental production of the names of people having knowledge of discoverable matters. Further, the government's duty to supplement discovery emanates from the government's agreement to do so as illustrated by the numerous occasions the government, without first being compelled to do so, supplemented its interrogatory answers. This duty to supplement was clearly breached by the government.

In the First Set of Interrogatories Propounded by Defendant to the Government, the petitioner asked:

> State the name and last known address of every person known to the United States Attorney for the Northern District of Ohio, Eastern Division, or his agents, employees, or representatives who claim to have any

knowledge of the alleged actions of the Defendant alleged in Counts I through VI of Plaintiff's complaint.

Chaim Sztajer's name never appeared in response to such interrogatory question. The government contends that because Sztajer, in the government's opinion, "misidentified" Ivan the Terrible, that Sztajer has no knowledge of the alleged actions of the defendant as alleged in the complaint. But, the government must remember that the instant lawsuit was not only brought by the government under the name of John Demjanjuk, but also under the names Ivan Grozny and Ivan the Terrible. Therefore, any knowledge of the defendant, Ivan the Terrible, held by a potential witness must be included in response to the above interrogatory question.

Further, the above interrogatory question was directly followed by a question which asked if any of the individuals named in the previous question had made a statement of some sort. Therefore, had the government properly answered the first question, the petitioner, by virtue of the subsequent question would have been aware of Sztajer's statement and been able to secure a copy thereof as well as his appearance at trial.

The fact that Sztajer's name was provided in an answer to a different interrogatory is of no consequence. Due to the petitioner's limited financial resources and the abundance of names of potential witnesses, residing all over the world, given to defense counsel by the government, not to mention investigation and inquiry as to defenses and defense witnesses, the petitioner was compelled to discriminately select and contact or investigate only those witnesses of substantial import. But had the government answered the interrogatories properly and in good faith, without the preconception that only the peti-

tioner could be Ivan the Terrible, then Sztajer would clearly have been one of the petitioner's most important people to personally contact.

Thirdly, the affidavit of Chaim Sztajer should have been given to the defendant pursuant to the petitioner's November, 1977 Request for Production of Documents. One thing that must be remembered when addressing the Request for Production of Documents is the type of case at hand. This is not a typical "civil" case where the names of witnesses and their statements are known by all parties and usually easily accessible to both. This case involves events which allegedly occurred in 1942-1943, with all the potential eyewitnesses residing in Europe, South America, the Middle East, and Australia. As a result, the petitioner had to rely upon discovery and the good faith of the government for the names and statements of persons with knowledge of the case, and the petitioner was compelled by necessity rather than by design to phrase the Request for Production of Documents in a broad rather than specific manner. See: *United States v. IBM Corp.*, 83 F.R.D. 92 (D.C., S.D.N.Y. 1979).

Moreover, although the government had previously supplied Sztajer's name, the government nevertheless still had a duty to produce Sztajer's affidavit. This is especially true where the names of potential witnesses provided the defendant are extremely numerous, and it would be a great hardship, financial or otherwise, upon the petitioner to attempt to contact each and every person. *Gebhard v. Isbrandtsen Co.*, 10 F.R.D. 119 (D.C.N.Y., 1950); *Durkin v. Pet Milk Co.*, 14 F.R.D. 385 (D.C. Ark., 1953).

Therefore, the government had the duty to provide the petitioner with the name of Sztajer in response to the proper interrogatory question and the duty to provide the petitioner with Sztajer's affidavit. The government

breached those duties. Clearly, this evidence was of the highest magnitude and not merely cumulative. No other Treblinka survivor had come forward and identified another as the Ivan of that camp.

(B) The Failure of the Government to Provide the Petitioner With the Names and Statements of Five Potential Soviet Witnesses

After the conclusion of the trial, but prior to the rendering of a decision by the trial court, the government, by letter, advised defense counsel of five additional Soviets who had been interviewed by Soviet authorities regarding this case. Of the five, one identified a photograph suspected of being a photograph of the petitioner as a person who served at Trawniki. The other four failed to make any photographic identifications. In addition, all five made statements regarding the Trawniki training camp as they all were admitted trainees of such facility. The petitioner contends that the government should have advised him of these potential witnesses and the information they possessed prior to trial. The information regarding the Soviet witnesses' names and statements was requested by the petitioner in various interrogatory questions and by the petitioner's Request for Production of Documents. Furthermore, each and every set of interrogatories, as well as the Request for Production of Documents, directed the government to timely supplement its responses. This the government did do on numerous occasions, but inexcusably failed to do so on this occasion.

The petitioner's main interest in these potential Soviet witnesses is their knowledge of the Trawniki Training Card. All five are admitted Trawniki trainees and as consequence should have some knowledge of the identification cards used there. If so, such testimony would be the

only first-hand evidence available to the trial court as to the trustworthiness of GX 5 and 6.[27]

Further, the protocols, although brief, provide additional fuel for the fire of controversy that surrounds GX 5 and 6. None of the five protocols, although taken in late 1980, indicate that the witnesses were shown GX 5 and 6 and asked whether or not such document was familiar. This seems peculiar in that the trial was only a couple of months away, and because the Soviet witnesses were asked to try and identify the photograph from GX 6 but were never shown the entire card. Further, there is an indication from the protocols of three of the Soviet witnesses that GX 5 and 6 differ from the identification cards issued these Soviets while they were at Trawniki. The protocols of those three Soviets indicate that their Trawniki identification cards carried the trainee's fingerprints.[28]

As a result, further doubt is cast upon the trustworthiness and ultimate admissibility of GX 5 and 6. The trial court considered this to be at best cumulative and speculative which it certainly may be absent the petitioner being given the opportunity to confront these potential witnesses. But given the opportunity, the end result could very well spell the demise of GX 5 and 6 and in turn the government's entire case.

---

27. One other witness, Heinrich Schaefer, was a Trawniki trainee, but very early in the camp's existence. Further, Schaefer being of German descent was treated differently than other trainees as evidenced by his job as paymaster of the Trawniki camp.

28. The trial court in its opinion states that the protocols do not support the contention that the fingerprints were also on the trainee's identification cards, but the statements clearly speak of the cards and fingerprinting together. (In the statements of Orlovoskii and Kharkovsky the two are mentioned in the same sentence and in Kolgushkin's statement in consecutive sentences.) Without further inquiry, the trial court's conclusion seems more unreasonable than the petitioner's.

(C) Need for a New Trial

It is apparent that the government's failure to provide the petitioner with Sztajer's affidavit and the names and statements of the five Soviets deprived the petitioner of evidence that in all likelihood was critical to his defense. Clearly, if the petitioner would have had the opportunity to personally communicate with Sztajer and the Soviets, and the information gathered from such sources was in accord with what the petitioner fully expects, the presentation of such evidence would clearly alter the verdict of the trial court.[29] Moreover, it cannot be said that the newly discovered evidence is merely cumulative where the issue of the identity of the infamous Ivan and the trustworthiness of the Trawniki Training Card become seriously clouded. Thus, a new trial should have been granted. *English v. Mattson*, 214 F.2d 406 (5th Cir. 1954); *United States v. Perea*, 458 F.2d 535 (10th Cir. 1972). Accordingly, the writ should issue.

IX. THE DETERMINATION OF RULES AND GUIDELINES MUST BE PROVIDED BY THIS COURT IN ORDER TO ASSURE THE DEFENDANTS IN THESE "NAZI COLLABORATOR DENATURALIZATION CASES" DUE PROCESS OF LAW.

The instant lawsuit has been categorized as a suit in equity. A suit in equity implies the dispensing of justice between the parties in an equal and impartial manner. It is a lawsuit which contemplates fairness and due process.

---

29. This Court could remand this matter to the trial court for the limited purpose of permitting the petitioner, at the government's expense, to investigate the information possessed by Sztajer and the Soviets.

It is a lawsuit which contemplates all parties having an equal opportunity to pursue pretrial matters outside the courtroom so that when the trial begins all parties stand on equal footing. In other words, one party does not come to trial armed with a howitzer while the other carries only a slingshot.

Clearly, procedural rules, statutes, and court decisions have seen fit to establish certain guidelines which attempt to assure equality at trial. Rules and guidelines are meant to deal with problems and issues which arise during the pendency of the vast majority of lawsuits. In other words, the very reason for the adoption of rules and guidelines is their ability to deal with 99% of the problems and issues presented in our courts of law. But within the greatest attribute of such rules and guidelines lies the most glaring fault. Once in a great while a lawsuit, or group of lawsuits, such as these "Nazi Collaborator Denaturalization Cases" presents problems and issues which conventional rules and guidelines cannot handle. As a result, one of two things occurs. Either the trial court makes changes and alterations in the conventional rules and guidelines to adopt to the particular unique facts and circumstances of the case, thereby assuring fairness in the proceeding, or the trial court stubbornly abides by the standard rules and procedures and the lawsuit becomes tainted with inequities. Unfortunately, in the instant lawsuit, the latter rather than the former occurred.

Due process is a living rather than a stagnant concept. In fact, due process lives and breathes by expanding or deflating so as to encompass the exigencies of new developments. *United States v. Ash, supra.* Obviously, when due process ceases to breathe, equity and fairness die.

In the instant matter, there is not just one instance where traditional rules and concepts as applied in their conventional manner failed to assure the petitioner due process of law. There are numerous instances, some of major importance and others less significant, which all snowballed throughout the pendency of this lawsuit resulting in an avalanche at trial.

Probably the most glaring inequity between the parties not only in this case but in these types of cases in general, is the financial imbalance, and the ability to have money to purchase manpower (investigators and the like) and witnesses (both lay and expert). Clearly, anytime the government is a party to a lawsuit the potential for imbalance in regard to financial resources is present. But in most instances, conventional rules and guidelines can rectify the imbalance and minimize the inequities, thereby giving both parties an equal opportunity to investigate and pursue factual matters. But, in the instant matter, the financial inequities were never resolved.

Beyond, the apparent financial imbalance between the two principals herein, we also must look to supporting casts. While the petitioner stood alone, the government received the overzealous assistance of Israel, not to mention the cooperation and assistance of the West German and Soviet governments. Furthermore, the government received the cooperation of other foreign governments in scanning the globe for witnesses.

As a result, the government was able, either through its own personnel or through the personnel of foreign governments, to conduct worldwide investigations, identification procedures, and depositions. In the end the government was able to produce lay witnesses from the Middle East, Europe, and South America, not to mention

expert witnesses from Europe and all parts of the continental United States, while the petitioner was compelled to almost exclusively rely on witnesses from the Greater Cleveland area, information from foreign governments which was first filtered through the State and Justice Departments, and discovery through written interrogatories.

As the trial court in *United States v. Fedorenko, supra,* and the appellate court in *United States v. Walus, supra,* recognized, these "Nazi Collaborator" cases are unique in the annals of our jurisprudence simply by virtue of the extreme passage of time. The extreme passage of time presents countless problems with investigations, discovery and identifications. Beyond these problems lie the international obstacles of language barriers, distance, the involvement of foreign governments, and financial resources. Therefore, in order to assure the defendant due process these cases cannot be dealt with along conventional lines. Accordingly, the writ should issue.

CONCLUSION

For the above-stated reasons, the Petition for Writ of Certiorari should be granted and the judgments of the Court of Appeals and District Court reversed.

Respectfully submitted,

JOHN W. MARTIN, *Counsel of Record*
SPIROS E. GONAKIS
1949 East 105th Street
Suite 207 Call & Post Building
Cleveland, Ohio 44106
(216) 795-1515
Attorneys for Petitioner

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed June 8, 1982)

No. 81-3415

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN DEMJANJUK, aka Iwan Demjanjuk, aka Grozny Ivan (Ivan the Terrible),
Defendant-Appellant.

APPEAL from the United States District Court, Northern District of Ohio, Eastern Division.

Before: KENNEDY and MARTIN, *Circuit Judges;* PHILLIPS, *Senior Circuit Judge.*

PER CURIAM. In this action appellant seeks review of a decision of the District Court vacating the order admitting him to citizenship and cancelling his certificate of citizenship. The District Court found as a matter of fact that appellant had made material misrepresentations regarding the nature of his wartime activities in his application for a visa under the Displaced Persons Act of 1948.

It held that clear and convincing evidence supported the government's contention that the appellant had willfully concealed that he had trained as an armed guard at Trawniki, Poland at a camp run by the German SS and thereafter served with the Nazis as an armed guard at the extermination camp in Treblinka, Poland. Since this information would have made appellant ineligible for a visa and for citizenship, the District Court concluded that appellant's citizenship must be revoked under 8 U.S.C. § 1451 (a) because it was "illegally procured." *Fedorenko v. United States*, 449 U.S. 490 (1981).

The District Court considered documentary evidence, eyewitness identifications and the appellant's own testimony, which it found not to be credible, in making its findings. Preliminary to his consideration of the Trawniki identification card and the eyewitness identifications, the lower court was called upon to make evidentiary rulings regarding the admissibility of this evidence and address due process challenges to it. It refused to admit a presidential statement and expert testimony on the suggestiveness of photo lineups proffered by appellant.

We agree with the conclusions of law reached by the District Court. We further conclude that the District Court's findings of fact are not clearly erroneous under a "clear and convincing" standard and the evidence properly admitted.

The District Court did not abuse its discretion in denying appellant's motion for a new trial based on newly discovered evidence. *Bayum v. Chesapeake & Ohio Ry. Co.*, 456 F.2d 658, 662 (6th Cir. 1972). The District Court found that appellant's failure to timely discover Dorofeev's protocol, through the fault of the government, was not prejudicial since his statements were adverse and cumu-

lative in light of the Trawniki identification card. The lower court indicated that Sztajer's affidavit could only be used to impeach the testimony of the six eyewitnesses and would not necessarily affect the outcome of the trial. *Thomas v. Nuss*, 353 F.2d 257, 259 (6th Cir. 1965).

One further matter requires attention. Appellant argues that he has been deprived of due process and a fair trial by the government's failure to pay for his attorney's fees and expenses. The concept of due process is indeed flexible and the circumstances of this case extraordinary. However, appellant was never denied any specific request for necessary expenditures by the District Court. The District Court did, in fact, condition the deposition of the German witnesses on appellant's counsel's ability to attend at government expense. We find nothing in the due process clause nor the facts of this case which would require a generalized award of fees and expenses to appellant's counsel.

Accordingly, the judgment of the District Court is affirmed.

APPENDIX B

DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed June 23, 1981)

No. C77-923.

UNITED STATES DISTRICT COURT,
Northern District of Ohio, Eastern Division

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOHN DEMJANJUK,
Defendant.

United States brought action under Immigration and Nationality Act to revoke certificate of naturalization of defendant and to vacate order admitting him to United States citizenship. The District Court, Battisti, Chief Judge, held that where defendant failed to disclose his service for German SS and willfully misrepresented that service on his visa application, defendant's failure to disclose his service was material misrepresentation and since defendant was ineligible for a visa under the Displaced Persons Act, his citizenship was also illegally procured and would be revoked.

Order entered.

MEMORANDUM DECISION AND ORDER

BATTISTI, *Chief Judge.*

This is an action under the Immigration and Nationality Act of 1952, 8 U.S.C. § 1451(a), to revoke the Certificate of Naturalization of the defendant, John Demjanjuk, also known as Iwan Demjanjuk, and to vacate the order admitting him to United States citizenship. The defendant was admitted to the United States for lawful permanent residence on February 9, 1952, pursuant to the Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009, *as amended by* the Act of 1950, 64 Stat. 219 [henceforth referred to as the DPA]. On November 14, 1958, the defendant became a United States citizen by order of the United States District Court, Cleveland, Ohio.

The Government's amended complaint alleges that the defendant served with German SS (Schutzstaffel) personnel during World War II at three locations during 1942-1943:

(1) at the SS training camp at Trawniki, Poland;

(2) at the extermination camp at Treblinka, Poland; and

(3) at the extermination camp at Sobibor, Poland.

The Government's complaint further alleges that defendant served in a German military unit composed of Ukrainians at times during 1944-1945.

Section 1451(a) of the Immigration and Nationality Act, provides that citizenship can be revoked if it was either illegally procured, or procured by concealment of a material fact or by willful misrepresentation. The Government's six-count complaint alleges that defendant should be denaturalized under both criteria. In Counts I-II, the Gov-

ernment alleges that defendant illegally procured his citizenship because (1) his activities during the war precluded him from obtaining a valid visa as an "eligible displaced person" under the DPA, and (2) the visa actually obtained by the defendant was invalid since he willfully misrepresented his whereabouts during the war. Counts III-IV alleged that defendant procured his naturalization by concealing and misrepresenting his service with German SS and military personnel during the years in question. The Government also alleges that defendant illegally procured his naturalization since he was not a person of good moral character. Count V alleges that defendant lacked the good moral character required for naturalization because of the commission of atrocities against Jewish prisoners at the extermination camp of Treblinka. Count VI alleges that defendant's failure to disclose his service in the German SS and the German military in his Application to File Petition for Naturalization (INS Form N-400) also indicates a lack of the good moral character that is a prerequisite to naturalization.

The right of citizenship once conferred should not be taken away without the clearest proof. As the Supreme Court recently reiterated, the Government has the burden of proving by "clear, unequivocal and convincing" evidence that defendant obtained his citizenship illegally or fraudulently. *Fedorenko v. U. S.*, ... U.S. ....., 101 S.Ct. 737, 747, 66 L.Ed.2d 686 (1981) (citing *Schneiderman v. United States*, 320 U.S. 118, 125, 63 S.Ct. 1333, 1336, 87 L.Ed. 1796 (1943)). This requirement is mandated by the magnitude of the right that is at stake in a denaturalization proceeding:

> "Citizenship obtained through naturalization is not a second-class citizenship. It has been said that citizenship carries with it all of the rights and prerogatives

of citizenship obtained by birth in this country 'save that of eligibility to the Presidency.' "

Knauer v. United States, 328 U.S. 654, 658, 66 S.Ct. 1304, 1307, 90 L.Ed. 1500 (1946) (quoting *Luria v. United States*, 231 U.S. 9, 22, 34 S.Ct. 10, 13, 58 L.Ed. 101 (1913)).

FINDINGS OF FACT

The defendant, John Demjanjuk, was born on April 3, 1920, in the village of Dub Macharenzi, Ukraine, a republic of the U.S.S.R. His father's name in Ukrainian is Mikola, the Russian form of which is Nikolai. (Tr. 28A) Defendant had little formal education, completing four grades of school while in the Ukraine. In 1939, defendant lived in Dub Macharenzi and worked as a collective farmer, sometimes as a tractor driver. Defendant was conscripted into the Russian army in 1940. On June 22, 1941, Germany invaded the U.S.S.R.

Three months after the war began, defendant, then a member of an artillery unit, was wounded in his back by shrapnel. The wound required hospitalization and upon release from the hospital, defendant returned to the front in the Crimea. Defendant admits that he was captured at the Battle of Kerch in the Crimea in 1942. (Tr. 1091) The Government called Dr. Earl F. Ziemke, a military historian specializing in the Eastern Front during World War II, who testified that from May 8-19, 1942, a major battle between the Germans and Russians did occur in the Kerch which resulted in 125,000 Russian soldiers being captured. (Tr. 51A-54A) It is likely, therefore, that defendant was captured by the German army no later than May 19, 1942.

Dr. Ziemke further testified that the Russian prisoners of war were then moved west from the Crimea to German POW camps, including Rovno, in the Western Ukraine,

and Chelm, Poland. (Tr. 55-A) Defendant testified that after being captured he was in fact transferred first to Rovno for a few weeks and then to Chelm. (Tr. 1069) Defendant did not recall the exact dates of this translocation, but testified he was in Rovno during 1942-1943 and in Chelm until 1943 or 1944. The Government produced additional evidence on the estimated chronology of when defendant was transferred from the Crimea to Rovno and then to Chelm. Government's exhibits 2 and 3 are certified copies of excerpts from German war diaries containing a daily chronicle of prisoners captured in the battle of Kerch in the Crimea in May 1942, and the subsequent relocation of such prisoners in German POW Camps. Government Exhibit 2 records that on May 16 and May 17, 1942, approximately 5,000 prisoners from the battle of Kerch were transported to Rovno. (Tr. 62A) Government Exhibit 3 indicates that 1,400 prisoners, mostly from the battle of Kerch, arrived in Chelm on June 2, 1942, and that other prisoners arrived in Chelm later on June 4-5, 1942. (Tr. 63A)

The Court concludes that it is likely that the defendant was transferred from the Crimea to the POW camps of Rovno and Chelm sometime in May-June 1942. Defendant offered no evidence on a more exact chronology and the accepted chronology was deemed plausible by expert testimony. (Dr. Ziemke, Tr. 58A-68A) Defendant's statement that he might have been in Chelm sometime in 1944 was contradicted by Dr. Ziemke's testimony that the Germans probably would not have maintained a POW camp at Chelm, Poland, any later than January 1944, since the Russian front was quickly moving westward at this time. (Dr. Ziemke, Tr. 1129-32)

Up to this point, the Government's evidence essentially corroborates and amplifies the defendant's own admissions

concerning his service in the Russian army and subsequent capture by the Germans. The major factual issues in this trial concern the defendant's whereabouts following his incarceration at the POW camp at Chelm. The Government believes that defendant was next transferred to Trawniki, Poland, a training camp run by the German SS, and was sent from there to Treblinka, Poland, where he assisted in the persecution and extermination of the Jews. Defendant denies ever being at either location. An examination of the historical relationship between Trawniki and Treblinka is prerequisite to an understanding of the evidence in this case.

In 1942 the Nazis initiated "Action Reinhard" in Poland, a codeword for the systematic extermination of the Jews from all the countries of Europe occupied by German forces.[1] Three extermination camps were constructed to implement the mass annihilation conceived by Action Reinhard. Two camps, Belzec and Sobibor, were located in the Lublin district of Poland, southeast of Warsaw. The third camp, Treblinka, was located in the district of Warsaw. (Tr. 98A) The German SS directly authorized Action Reinhard, although personnel from the "euthanasia program"[2] were also often used in actually implementing the plan. (Tr. 103A-104A)

---

1. Historical background on Action Reinhard and the relationship between the SS camp, Trawniki, the German POW camps, and the extermination camps was provided by the expert testimony of Dr. Wolfgang Scheffler. Dr. Scheffler is a professor of political science at the Free University of Berlin and is an authority on the Nazi persecution of the Jews. Dr. Scheffler has also offered his expert opinions in several German trials concerning participants at the extermination camps of Sobibor and Treblinka. (Tr. 78A-94A)

2. Between 1939-1941 approximately 100,000 so called "mentally ill" persons were exterminated under the euthanasia program in special hospitals which later served as models for the extermination methods used to exterminate the Jewish population. (Tr. 104A)

The German SS lacked sufficient manpower in the Lublin district to carry out all the "tasks" of Action Reinhard. (Tr. 109A) Consequently, Russian POWs were employed in rounding up and transporting the Jews from the ghettoes to which they had been confined and also as staff in the concentration camps themselves. (Tr. 106A) These Russian POWs were obtained from prisoner of war camps in Eastern Poland, among them, Rovno and Chelm. (Tr. 107A) Prisoners from Rovno and Chelm were taken to Trawniki, a camp operated by the German SS, located southeast of Lublin.[3] (Tr. 7-8)

Once at Trawniki, the Russian POWs were given uniforms (at first black and later earth brown), organized into companies, platoons, and groups and given training in weapons. (Tr. 116A-118A) Upon entering these new units, the former POWs took an oath of service to the German SS and in fact were subject to the rules and regulations governing the German SS.[4] There was testimony that Krainian soldiers at Trawniki were paid a salary in Polish currency. (Tr. 194) Units of these Trawniki guards were transferred to the concentration camps of Belzec, Sobibor, and Treblinka where they performed most of the duties that were necessary in the extermination camps, including guarding the camp and supervising the Jewish victims as they were being herded to the gas chambers. (Tr. 118A-119A) According to expert testimony, these Trawniki

---

3. *See United States v. Fedorenko*, 455 F.Supp. 893, 900 (S.D.Fla.1978), *rev'd* 597 F.2d 946 (5th Cir. 1979), *aff'd on other grounds* 449 U.S. 490, 101 S.Ct. 737, 66 L.Ed.2d 806 (1981). [henceforth, *Fedorenko*]. In this case the defendant testified that he was a Russian solider, captured by the Germans, transported first to a POW camp at Rovno, then to a camp at Chelm, and finally to Trawniki. Fedorenko was eventually transported to Treblinka in September 1942.

4. *See also* testimony of Heinrich Schaefer. (Tr. 188-192) Schaefer indicated that the Ukrainian guard units were technically not members of the German SS. (Tr. 208)

guards were indispensable to the operation of Action Reinhard.[5] Action Reinhard came to a conclusion in the late fall of 1943 when Jewish prisoners revolted at Sobibor and Treblinka, and all three of the concentration camps were subsequently destroyed and camouflaged. (Tr. 123A; 133A)

A. Government's Evidence That Defendant Was At Trawniki

The Government's proof that the defendant was at Trawniki are Government's Exhibits 5 and 6 two sides, front and back, of a single German war document, the original of which is in the Vinnitskiy Oblast State Archive, U.S.S.R.[6] The Court initially received certified photographic copies of the document (Govt. Exs. 5-6) under Fed.R. Evid. 902(3)-(4). During the course of the trial, the original was made available by Soviet authorities for inspection and study by the Court and by the defendant. Photographic enlargements of the original document, Government's Exhibits 5(b) and 6(b) were then substituted for the original, which was returned to the custody of the Soviet archive.

Throughout the trial, defendant contended that Government's Exhibits 5 and 6 were not authentic and sug-

---

5. Dr. Scheffler testified that at each of the three concentration camps, Belzec, Sobibor, and Treblinka the number of Trawniki guards significantly exceeded the German staff assigned to the camps. (Tr. 119A) It is estimated that over the entire period of Trawniki's existence, between 3,500 and 4,000 men were trained by the Germans. (Tr. 121A) The estimated number of Trawniki guards periodically serving at these concentration camps during Action Reinhard is Belzec (60); Sobibor (200); Treblinka (120). (Tr. 119A) It is conjectured that transfers occurred between Trawniki and the three other camps on the basis of need and exigency. (Tr. 121A)

6. The advancing Russian armies that pushed the Germans westward across Poland in 1944-1945 captured many war documents, including the administrative files of the German SS in the district of Lublin. Trawniki is located within the Lublin district. (Scheffler, Tr. 10)

gested the possibility of forgery. However, at no time during the entire course of the trial was *any* evidence introduced to substantiate these speculations. Since the Court concludes that the defendant was present at Trawniki based on an examination of Government's Exhibits 5 and 6, it is necessary to review the evidence supporting the authenticity of this document (to be referred to as the "Trawniki card").

Government's Exhibit 5 is an identification card clearly stating that "Iwan Demjanjuk is employed as a guard in the Guard Units (Wachmannschaften) of the Reich Leader of the SS for the Establishment of SS and Police Headquarters in the New Eastern Territory." The card carries the additional heading in boldface printing: "HEADQUARTERS LUBLIN, TRAINING CAMP TRAWNIKI, I.D. No. 1393."

Dr. Wolfgang Scheffler, an historian thoroughly familiar with German war documents (Tr. 85A-90A; 10-19), identified Government's Exhibit 5 as a service identification card, issued by the German SS, bearing the stamp of the SS Polizeifuhrer in the district of Lublin, and signed by Karl Streibel, the commandant of the Trawniki camp. (Tr. 19-25) It should be noted that although Dr. Scheffler testified that he had never seen a card identical to Exhibit 5 (Tr. 99-100), his testimony verified all the indicia on the card as being historically accurate.[7] Scheffler testified that such a card would have to have been issued during the period July 1941-July 1942, since the appellation "Representative of the Riechsfuhrer-SS for the Establishment of SS and Police Headquarters in the New Eastern Territory" was only in use during this period. (Tr. 23)

---

7. Neither party produced another document exactly like Government's Exhibits 5 and 6 and the Government is not aware of the existence of another document similar to the Trawniki card. (Tr. 1150-1151)

The testimony of Dr. Scheffler was corroborated by the testimony of Heinrich Schaefer. (Tr. 178 *et seq.*) Schaefer was a Russian soldier, captured by the Germans in Poland, and taken to Trawniki at the end of August 1941. (Tr. 185-188) At Trawniki, Schaefer worked as a paymaster in the camp's administrative office, paying the camp's Ukrainian guards. (Tr. 194) The official title of the Trawniki camp administration where Schaefer worked was "SS Standortverwaltung Lublin, Zweigstelle Trawniki" which translated means SS Garrison Lublin, Branch Office of Trawniki.[8] (Tr. 194) Schaefer was shown Government's Exhibit 5 and testified that it was an official I.D. card issued to all the persons training at Trawniki, that he himself had been issued such an I.D. card. (Tr. 215) Schaefer also identified the signature of Streibel, the camp commandant, since Streibel had often signed his leave passes. (Tr. 215)

The reverse side of the Trawniki card is Government's Exhibit 6. The left side of this exhibit contains a photograph, allegedly of the defendant, his name, family history, personal characteristics, and army assignments. The right side of Exhibit 6 contains a checklist of issued equipment, the signature of the issuing officer, Teufel, and the alleged signature of the defendant, indicating receipt of the enumerated equipment.

Dr. Scheffler was shown Exhibit 6 and indicated, again, that he had never seen a card exactly like Exhibit 6. However, Dr. Scheffler's testimony nevertheless verified the historical accuracy of the indicia found on the card. Particularly, Scheffler noted that the two stamps overlapping the photograph bear the legend: "SS Stan-

---

8. A "Standortverwaltung" in the Germany army lexicon signified the administrative army unit responsible for providing housing and equipment in the particular area involved.

dortverwaltung Lublin, Zweigstelle Trawniki." (Tr. 25-28) Dr. Scheffler testified that it is known from former members of the Standortverwaltung of the branch Trawniki that one of the responsibilities of the administration was to provide supplies and equipment for the guard units stationed at Trawniki. (Tr. 26) This testimony is not only internally consistent with the equipment marked as "issued" on the right side of Government Exhibit 6, but corroborates the testimony offered by Heinrich Schaefer.

Schaefer recognized the "Standortverwaltung stamp" on Exhibit 6 as the "official seal of our unit in Trawniki." (Tr. 211-212) In addition, he testified that a man by the name of Ernst Teufel was in charge of the disposition of clothing within the administration (Tr. 195), and that Teufel held the rank of SS Rottenfuhrer or private first class. (Tr. 196) Upon examining the signature of "Teufel, SS Rottenfuhrer" on Exhibit 6, Schaefer indicated that this was the familiar signature of Ernst Teufel, with the idiosyncratic feature of the "T" written as the numeral "7". (Tr. 210) Schaefer admitted that he had never seen a card similar to Government's Exhibit 6, although he also testified that everyone at Trawniki had his photograph taken in the summer of 1942 and that the white rectangle on the chest of the subject photographed in Government's Exhibit 6 bore the identification number (not visible to the naked eye on either Govt's Exs. 6 or 6(b)[9]) of the particular soldier. (Tr. 229-230; 197-198)

Finally, the Government offered the testimony of Gideon Epstein, an expert forensic documents examiner and specialist in the examination of questioned documents.

---

9. Microscopic analysis of the original Trawniki card revealed three of the four numbers that appear on the white rectangle on Government's Ex. 6, and these are 1?93. (Epstein, Tr. 903) The identification number on the other side of the card, Government's Ex. 5, is 1393.

(Tr. 122-126) Epstein initially conducted his tests on the photographic copies of the Trawniki card (Govt. Exs. 5 and 6) and later conducted the same tests on the original document when it became available. Two different tests were conducted by Epstein. First, the signature of Karl Streibel on Government's Exhibit 5 and the signature of Ernst Teufel on Government's Exhibit 6 were examined and compared with known signatures of the same men. (Govt. Exs. 7, 8; Govt. Ex. 12) Epstein concluded that the signatures of Streibel and Teufel on Government's Exhibits 5 and 6 were authentic. (Tr. 132-133) Second, Epstein conducted an examination of Exhibits 5 and 6 to determine whether the documents had been altered or obliterated in any material way. Again, Epstein concluded that the documents had not been altered. (Tr. 151; 153)

Epstein conducted the same tests on the original Trawniki identification card when it became available and confirmed his previous conclusions. (Tr. 903) The only difference noted between the original Trawniki identification card and Exhibits 5 and 6 was that the left side of the original contained handwriting which had been blocked off the photographic copy (compare Govt. Exs. 5 and 5(b)[10]).

In the course of examining the original document, Epstein also studied the signature, "Demjanjuk" which appears on the lower right side of Government's Exhibit 6. (*See* Govt. Ex. 6(c)) This signature was compared with

---

10. A cursory examination of Exhibits 5 and 6 reveals handwriting interlineated between the German type. This handwriting is in Russian and is a Russian translation of the printed matter. (Tr. 912) Epstein opined that the Russian handwriting was probably done by the same person (Tr. 901) and a translation of the Russian writing on the left side of Government's Exhibit 5(b) reveals that a Russian translator entered the interlineations in 1948. (*See* Govt. Ex. 5(a)(i))

known signature exemplars of the defendant. Epstein was unable to reach any definitive conclusions as to the common authorship of these signatures, because the signature on Government's Exhibit 6 is written in the Cyrillic alphabet (Tr. 1111), and Epstein lacked a comparable known signature of the defendant in the Cyrillic alphabet with which to compare the signature on Government's Exhibit 6. (Tr. 904-905) Defendant denies that the signature on Exhibit 6 is his. (Tr. 111; 1117)

Personal information of the defendant found on Government's Exhibit 6 perhaps most compellingly indicates defendant's presence at the SS training camp of Trawniki. Government's Exhibit 6 contains defendant's name, birthdate (April 3, 1920), father's name (Nikolai), birthplace (Dub Macharenzi),[11] and nationality (Ukrainian). In addition, under the line "special features" is written "scar on back." Defendant has admitted that he was wounded in the back by shrapnel early in the war as a Russian soldier. Other personal attributes, though disputed by the defendant, are corroborated by defendant's sworn statements in his application for an immigration visa (Govt. Ex. 21). Government's Exhibit 6 lists defendant's hair as dark blonde and his eyes as grey. The defendant testified that his eyes are blue and that in 1942, the year in which the Government alleges defendant was at Trawniki, his hair color was light blonde. (Tr. 1074-1075). Defendant's application for immigration visa, December 27, 1951, however, lists defendant's eyes as grey and his hair as brown. (Govt. Ex. 21)

Finally, the photograph found on Government's Exhibit 6, in the opinion of the Court, clearly reflects the facial

---

11. Government's Exhibit 6 lists defendant's place of birth as Dub Macharenzi, Saporosche. The inclusion of the district, Saporosche is apparently erroneous. (Tr. 1116-1117)

features of the defendant.[12] The defendant did not definitely deny that Government's Exhibit 6 contained a photograph of him. Rather, his response was equivocal in nature:

"Q. And as to Government's Exhibit 6, the photograph on there, is that a photograph of you?

"A. I cannot say. Possibly it is me.

"Q. Well, why can't you be sure?

"A. Because I never had such hair as the man in the photograph except in the Russian army.

"Q. Then if the photo is yours, it would have to have been during an era that you were in the Russian Army?

"A. Yes."

(Tr. 1076). The Court specifically finds that the photograph on Government's Exhibit 6 is that of the defendant.

On the basis of all evidence reviewed above, the Court concludes that Government's Exhibits 5 and 6 are authentic and clearly show that defendant was at the German SS training camp of Trawniki.[13]

Neither Exhibit 5 nor Exhibit 6 contains a date as to when the card was issued, and therefore it is not certain when defendant was at the Trawniki camp. The Government did adduce evidence, however, from which an ap-

---

12. Assuming, as the government contends, that defendant was at Trawniki in 1942, defendant would have been 22 years old when the photograph on Government's Exhibit 6 was taken.

13. As indicated above, the defendant failed to introduce any evidence which challenges the authenticity of the Trawniki card. Although the original card was made available to the defendant for the purpose of expert documents analysis, no such analysis was conducted. The defendant has denied ever being at Trawniki or ever being issued a document like the Trawniki card. (Tr. 1076)

proximate date for the card may be ascertained. First, it was noted by Dr. Scheffler that the Trawniki card would have to have been issued during the period July 1941-July 1942, since the appellation "Representative of the Reichsfuhrer-SS for the Establishment of SS and Police Headquarters in the New Eastern Territory" was only utilized in this limited period. (Tr. 23)

A more exact date for the issuance of the Trawniki card was suggested by other evidence introduced by the Government. Government's Exhibit 6 was signed by Ernst Teufel, rank, SS Rottenfuhrer. Government's Exhibit 9 corroborates this fact; it is a German war document suggesting the decoration of certain enlisted men, dated March 10, 1942, and issued by the German SS for the District of Lublin. The list of names contains that of Ernst Teufel, stationed at Trawniki, holding the rank of SS Rottenfuhrer. (Tr. 30-32) Government's Exhibit 10 is an allowance or salary chart card from the German SS personnel files in Berlin for Ernst Teufel. Item six of Teufel's card shows that he was promoted to the rank of SS Unterscharfuhrer on July 19, 1942. The rank of SS Unterscharfuhrer was the next advancement from the rank of SS Rottenfuhrer in the German army. (Tr. 32-34) It is therefore likely, based on Government's Exhibit 10, that Teufel signed the Trawniki card, Government's Exhibit 6, prior to July 19, 1942.

The Court previously concluded, based on expert testimony and other adduced evidence, that defendant was captured by the Germans in May 1942, and probably transferred from the Crimea to the POW camps of Rovno and Chelm sometime in May-June 1942. Following his incarceration at the POW camps, it now appears that defendant was transferred to the SS training camp at Trawniki sometime during the summer of 1942, prior to July 19, 1942.

The Government next contends that defendant was transferred from Trawniki to the extermination camp of Treblinka, Poland, in the fall of 1942. The defendant asserts that he never served the Germans as a guard in any concentration camp. (Tr. 1116) The Government produced six eyewitnesses from Treblinka, five Jewish survivors and a German guard who identified the defendant from photographs as the man known to them simply as Ivan,[14] the operator of the camp gas chambers, and a man who killed, beat, and abused Jewish prisoners at Treblinka.

B. Treblinka

The extermination camp of Treblinka was located in the district of Warsaw, Poland, and operated from July 1942 until August-September of 1943. (Tr. 98A; 123A) As indicated previously, Treblinka was part of the overall plan of Action Reinhard and it is an historical fact that former Russian POWs, often Ukrainians, were trained at Trawniki and later sent to serve at the concentration camp of Treblinka.[15] (Scheffler, Tr. 118A-125A)

The ghoulish, diabolical operation of Treblinka, resulting in the almost incomprehensible annihilation of 900,000 Jews (Tr. 126A) is indelibly stamped on the human conscience, and unfortunately is now a part of the human experience.[16] Certain aspects of the topography of Treblinka

---

14. The Russian proper name, Ivan, and its Ukrainian analogue, Iwan, are very common names, being the English equivalent of John. They will be used interchangeably in this decision.

15. In *Fedorenko*, the defendant admitted that he had received training at Trawniki and then was transported to Treblinka in September 1942 where he served as a guard. *U.S. v. Fedorenko*, 455 F.Supp. 893, 901 (S.D.Fla. 1978)

16. A description of the grotesque *modus operandi* at Treblinka may be found in *U.S. v. Fedorenko*, 455 F.Supp. 893, at n. 12 (S.D.Fla. 1978).

are relevant in the instant action. The death camp at Treblinka was divided into two parts, referred to as camp 1 and camp 2. (Govt. Ex. 15; Tr. 587-588) Camp 1, or the lower camp, was the "receiving" area for the transports of Jewish prisoners who were brought by sealed railroad cars to Treblinka. The upper camp, or camp 2, contained two gas chambers, a large facility with ten chambers and a smaller facility with three chambers. The burial pits for the exterminated bodies were located in camp 2 in close proximity to the gas chambers.

The Government called five surviving Jewish prisoners from Treblinka who testified at trial: Chil Rajchman, Elijahu Rosenberg, George Rajgrodzki, Sonia Lewkowicz, and Pinhas Epstein. In addition, the Government produced the videotape testimony of Otto Horn, a German guard at Treblinka, who was tried and completely exonerated for his activities at Treblinka in Germany in 1965. (Tr. 330) It is extremely important to note that all these witnesses were located for extensive periods of time in camp 2, the upper camp. Rajchman, Rosenberg, Rajgrodzki, and Epstein all shared the grim task of transporting dead bodies to the burial pits. (Tr. 421-422; 511-512; 580-581; 643) This work brought them in close proximity to the gas chambers. Sonia Lewkowicz worked in the kitchen and laundry of camp 2 directly behind the gas chambers. (Tr. 633) Otto Horn, classified as a male "nurse" in the German military, was assigned to duty in camp 2 supervising the Jewish prisoners as they burned corpses and worked near the pits. (Tr. 385)

Each of the witnesses recalled a Ukrainian named "Ivan"[17] who not only herded the Jewish prisoners into

---

17. The fact that the survivors of Treblinka remember this man only as "Ivan" or "Iwan" is not especially surprising. Testimony revealed that the Jewish inmates knew their captors only by nickname or proper name; a closer social familiarity might easily have led to death.

the gas chambers, but also activated the motors which gassed the Jews. (Tr. 306-307; 426; 514-515; 581; 633; 651-652) The savage cruelty of this notorious man earned him the special nickname among the camp's Jewish inmates, "Ivan Grozny" or "Ivan the Terrible." The duties which each witness performed at Treblinka should be examined in some detail because such examination is relevant to the credibility of the photographic identifications made by these witnesses.

Otto Horn was assigned to Treblinka in late October 1942 and was stationed in camp 2, until early September 1943, supervising the Jewish prisoners as they burned corpses and shoveled earth into the burial pits. (Tr. 385) Horn testified that Ivan was always present at the gas chambers (Tr. 306), that "he was Schmidt's right hand"[18] and enjoyed especially good terms with the German officers at the camp. (Tr. 308-309) Horn unequivocally testified that he had seen Ivan inside the gas chambers, directing the prisoners into the chambers and later operating the engines that sent the fatal gas into the chambers.[19] (Tr. 325-330) Horn was the only witness who testified that he had never seen Ivan commit any other atrocities while at Treblinka. (Tr. 398)

Chil Rajchman, the first of the Jewish survivors to testify, entered Treblinka in October 1942 and after three days was assigned to camp 2, first as a carrier of the dead corpses and later as a "dentist."[20] (Tr. 421-403) Rajchman

---

18. Schmidt was a German officer in charge of the gas chambers. (Tr. 306)

19. Horn specifically marked a map of Treblinka indicating where he saw Ivan working inside and outside the gas chambers. *See* Government's Exhibit 1 attached to deposition of Otto Horn, February 26, 1980 and Tr. 325-327.

20. Rajchman was responsible for extracting valuable dental work from the mouths of the dead.

remained in camp 2 until August 1943.[21] Rajchman identified Ivan as the man who operated the gas chambers. (Tr. 426) He witnessed a particular incident in which Ivan used a wood drill to torture one of his friends. (Tr. 426) Other atrocities perpetrated by Ivan were personally witnessed by Rajchman. (Tr. 427) It was noted that the barracks where the Jewish prisoners were confined in camp 2 afforded a clear view of the small gas chambers and Ivan's presence nearby. (Tr. 489)

Elijahu Rosenberg also entered Treblinka in the fall of 1942 and was soon assigned to camp 2 where he served as a corpse carrier for a few weeks. (Tr. 510; 512) After this, he was chosen to work inside the gas chambers removing the bodies after a gassing. Rosenberg testified that he saw Ivan at the gas chambers whenever more Jewish prisoners arrived. (Tr. 515) Ivan beat and tortured the incoming prisoners, herded them into the gas chambers, and then activated the destructive motors. (Tr. 515) He related other atrocities committed by Ivan which he had witnessed. (Tr. 516)

George Rajgrodzki entered Treblinka in September 1942 and worked as a corpse carrier in camp 2 from September through the end of November 1942. (Tr. 580) After this, Rajgrodzki worked in the kitchen of camp 2 for the rest of the time of his incarceration at Treblinka. Rajgrodzki, like all the body carriers, was often in the area of the gas chambers. (Tr. 582) The witness related that Ivan once gave him twenty lashes for being late for roll call. (Tr. 582) Rajgrodzki also recalled that Ivan once came over to the prisoners' barracks to hear him play the violin. (Tr. 584) In summary, Rajgrodzki testified

---

21. The latest any of these witnesses was at Treblinka was August 2, 1943. On this day the Jewish prisoners revolted and some escaped.

that he had ample opportunity to view both Ivan, and another Ukrainian, Nikolai, who operated the gas chambers:

> "I had plenty of opportunity to see them; for instance, by the gas chamber, sometimes one and sometimes, the other. I saw them in the area where we were carrying the corpses. I even was aware of them herding people in from the other side. . . ."

(Tr. 592)

Sonia Lewkowicz was incarcerated in Treblinka from December 1942 until August 1943. On March 5, 1943, Lewkowicz was assigned to work in the kitchen and later the laundry of camp 2 where she remained for the rest of her time at Treblinka. (Tr. 611) Mrs. Lewkowicz's work was in proximity to the gas chambers:

> "Q. Mrs. Lewkowicz, how often were you actually in the area of the gas chambers?
>
> "A. I was there many times. I was at the place where I hung the laundry. This was behind the gas chambers. I went there to hang up the laundry and to take off the laundry.
>
> "Q. Were you ever there during the time there were gassings going on?
>
> "A. One time when I was hanging the laundry there were people inside the gas chambers and I heard terrible screams from the gas chambers.
>
> "Q. But only on this one occasion; is that correct?
>
> "A. One and only one."

(Tr. 633) Lewkowicz testified that a Ukrainian named Ivan activated the gas chambers. (Tr. 611)

Finally, Pinhas Epstein testified that he was in Treblinka from September 1942 until August 1943. Epstein

also served most of his time in camp 2 as a corpse carrier (Tr. 643) affording him a clear view of the gas chambers:

"Q. Have you ever had occasion to be present when the motors to the gas chambers were turned on?

"A. Yes, sir.

"Q. Were you able to see this area clearly, the area where the motors were?

"A. Yes, sir.

"Q. And do you know who operated the motors?

"A. The motors were activated by two Ukrainians; one was Iwan and the second was Nikolai."

(Tr. 651) Epstein also testified about other atrocities he saw Ivan commit. (Tr. 653)

C. Photographic Identifications

The evidence linking the defendant with this notorious Ivan at Treblinka are the photographic identifications made by the six witnesses both before trial and at trial. No in-court identification was attempted by either the Government or the defendant. All the pretrial photographic identifications except for Rajchman's were conducted overseas.[22] Several different photospreads were shown individually to each of the witnesses by different investigators on various dates.[23] Two photographs of the

---

22. Rajchman viewed the photospreads in New York; Horn in West Berlin; Rosenberg, Rajgrodzki, Lewkowicz, and Epstein in Israel.

23. Horn was shown photospreads by American officials initially on November 14, 1979, and later at his videotaped deposition on February 26, 1980. American officials also showed Rajchman photospreads on March 12, 1980. Israeli authorities were responsible for conducting the pretrial photo-identifications with the remaining witnesses on the following dates: Rosenberg (May 11, 1976; December 25, 1979); Rajgrodzki (May 1978); Lewkowicz (March 15, 1978; December 27, 1979); Epstein (March 29, 1978; December 25, 1979)

defendant were utilized in these identification sessions. Each witness was shown a photospread containing a picture of the defendant taken from his 1951 application for an immigration visa. The defendant at this time was thirty one years old. Each witness picked out defendant's visa photograph and identified defendant as the man known as Ivan at Treblinka. In addition to the visa picture, five of the six witnesses were also shown another photospread containing the picture of the defendant found on the Trawniki card, Government's Exhibit 6.[24] Four of those witnesses picked out the photograph from the Trawniki card and again identified defendant's picture as that of Ivan. The fifth witness, Rajchman, failed to identify defendant's Trawniki picture on Government's Exhibit 6 in a pretrial confrontation, but did so at trial. A review of the photographic identification testimony of each witness follows.

Otto Horn viewed two photospreads which were only shown to Horn and to none of the other witnesses. (*See* Government's Exhibits 2 and 3 attached to the deposition of Horn, February 26, 1980). Each of the photospreads contained eight separate photographs. Prior to his videotaped deposition, Horn in succession picked out both defendant's visa picture and the Trawniki photograph and identified defendant as the Ivan he knew who worked at the Treblinka gas chambers. (Tr. 310-317) Later, at his videotaped deposition, Horn once again picked out the same photographs and made the same identification. (Tr. 318-324) The Court finds no aberrations in the conduct of these identifications which may be said to detract from the identifications Horn made.

Rajchman viewed Government's Exhibit 16 containing eight separate photographs, including defendant's visa

---

24. Rajgrodzki was not shown the photograph of defendant found on the Trawniki card, Government's Exhibit 6.

picture. At the pretrial identification, Rajchman was asked whether he recognized anyone from Treblinka. Rajchman looked through the pictures, picked out defendant's visa photograph and stated: "I believe this is a picture of the Ukrainian Ivan." (Tr. 428-430) Rajchman selected the same visa photograph of the defendant at trial. At the pretrial identification, Rajchman was also shown Government's Exhibit 19, a photospread consisting of eight separate photographs, including defendant's Trawniki picture. Rajchman failed to identify defendant on the basis of the Trawniki photograph. (Tr. 487) However, when defense counsel allowed the witness to examine the photographs of Government's Exhibit 19 at trial, Rajchman picked out the Trawniki photograph and identified defendant as the Ivan he knew from Treblinka. (Tr. 482-483)

In 1976 Rosenberg was shown a photo album, Government's Exhibit 17, and was asked to identify people who were at Treblinka. (Tr. 517) Government's Exhibit 17 consists of forty-three photographs, of various size and quality, numbered and affixed to cardboard pages. The defendant's visa photograph, # 16, is found on the third page. Rosenberg testified that he looked through all the photographs, although a statement made at the time of the investigation indicates that he was shown seventeen photographs, presumably the first seventeen photographs in the album. (Government's Exhibit 29(a)) Rosenberg identified photograph # 16, defendant's visa photograph, as that of Ivan:

"Q. Now, at the time could you be certain of your identification?

"A. I was certain, but I left myself a little leeway on the possibility so that I did not say 100 percent; but, in my heart, I saw his appearance, the build of his head, and inside of me I was certain that that was him."

(Tr. 519) Rosenberg stated that his only hesitation was that the picture made defendant look more mature than he remembered Ivan to be at Treblinka. This, of course, is an accurate observation, since the visa photograph represents the defendant at age thirty-one, whereas in 1942 defendant would have been twenty-two years of age.[25] When the investigator told Rosenberg that according to her knowledge, the man he had chosen was not at Treblinka, Rosenberg reiterated: "I'm identifying him, he was in Treblinka; he resembles very much a Ukrainian whose name is Ivan." (Tr. 519)

Three years later, Rosenberg was shown Government's Exhibit 19, a photospread consisting of eight photographs, including defendant's Trawniki photograph. (Tr. 523) Rosenberg was told to point out the picture of the man known to him as Ivan, and he selected defendant's Trawniki photograph.[26] Rosenberg later identified both defendant's visa picture in Government's Exhibit 17 and the Trawniki photograph from Government's Exhibit 19 at trial.

Rajgrodzki was only shown a photospread containing defendant's visa photograph, Government's Exhibit 17. Rajgrodzki testified that at the pretrial identification, he looked through the entire photo album of forty-three pictures and identified defendant's visa photo as the "Iwan who was in camp 2" at Treblinka. (Tr. 586) Subsequently at trial, the witness again identified defendant's visa photograph.

The pretrial identifications conducted before Mrs. Lewkowicz were initiated in 1978. Mrs. Lewkowicz was

---

25. *See also* corroborating statement taken by the investigator at this time, Government's Exhibit H.

26. *See also* corroborating statement taken by the investigator at this time, Government's Exhibit 30(a).

shown the photo album, Government's Exhibit 17, containing defendant's visa photograph. The witness testified that she leafed through the album from beginning to end, although a statement prepared at the time suggests the possibility that the witness viewed only the page containing defendant's visa photograph and seven other photographs. (Defendant's Exhibit BBB) Mrs. Lewkowicz selected defendant's visa photograph and identified him as the Ivan she knew from the Treblinka gas chambers. (Tr. 613) A year later Mrs. Lewkowicz was shown the eight photographs in Government's Exhibit 19 and she selected and identified the defendant's Trawniki photograph. (Tr. 615) Mrs. Lewkowicz identified the same photographs in both photospreads at trial.

Finally, Pinhas Epstein was shown the photo album, Government's Exhibit 17, in 1978. Epstein testified that he looked through the album, although, again, a statement made at that time reflects the possibility that only eight photographs were then viewed. (Defendant's Exhibit CCC) The witness unequivocally selected the defendant's visa photograph as the Ivan he knew from Treblinka:

> "The witness points to Photo 16 and says: The person shown here reminds me a lot of Ivan. The picture is not completely in focus. The age differential also must be taken into account. The general shape of the face, especially the curvature of the forehead strengthen may [sic] opinion that it is Ivan. The short neck is characteristic on the broad shoulders-exactly what Ivan looked like."

(Defendant's Exhibit CCC) A year later, Epstein was shown the eight photographs that comprise Government's Exhibit 19 and once again he selected and identified defendant's Trawniki photograph. (Tr. 657) Both photographic identifications were later verified at trial.

Defendant seeks to exclude evidence of the eyewitness photographic identifications on two grounds. The first ground is more easily disposed of. Defendant contends that the conduct of post-complaint photographic identifications outside the presence of defense counsel violated his fourteenth amendment guarantee to due process of law. Denaturalization proceedings are civil in nature although due to the valuable right of citizenship sought to be withdrawn, the Government must establish its allegations by evidence that is clear, convincing and unequivocal. *Schneiderman v. United States*, 320 U.S. 118, 63 S.Ct. 1333, 87 L.Ed. 1796 (1943). The Supreme Court has held that in criminal proceedings an accused does not have a Sixth Amendment right to have counsel present when the Government conducts a post-indictment photographic identification proceeding. *United States v. Ash*, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973) Certainly the mere absence of counsel during the identification proceedings cannot be said to have denied defendant due process of law. Our legal system has always placed primary reliance for the ascertainment of truth on the "test of cross-examination" and effective cross-examination can be utilized to reveal any deficiencies in photographic identification procedures. Defendant conducted rigorous cross-examination of all six witnesses concerning the pretrial identification proceedings in this case. This adversary mechanism adequately compensated for the absence of defense counsel at the pretrial identification proceedings.

The defendant also argues for the exclusion of the pretrial and in-court identification testimony of four witnesses: Rosenberg, Lewkowicz, Epstein, and Rajgrodzki. It is defendant's contention that the pretrial photographic identifications of these witnesses were so conducive to mistaken identification as to deny defendant due process of law.

The Supreme Court has observed in criminal cases that the reliability of an eyewitness identification at trial following a pretrial identification must be evaluated in light of the totality of circumstances in each individual case. *Simmons v. United States,* 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247 (1968). Unnecessary suggestiveness alone does not require exclusion of identification testimony. *Manson v. Brathwaite,* 432 U.S. 98, 97 S.Ct. 2243, 55 L.Ed.2d 140 (1977). The focus is on the reliability of the witnesses' identification rather than on the flaws in the pretrial identification procedures. The Court has posited a list of factors to be considered in evaluating the reliability of questioned pretrial identifications:

> "As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation."

Neil v. Biggers, 409 U.S. 188, 199-200, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972).

Two courts confronted with denaturalization proceedings similar to the instant case have relied upon these general parameters which the Supreme Court developed in the context of criminal prosecutions. *United States v. Fedorenko,* 455 F.Supp. 893, 905 (S.D.Fla.1978); *United States v. Walus,* 453 F.Supp. 699, 712 (N.D.Ill.1978), *rev'd* 616 F.2d 283 (7th Cir. 1980). The Court believes reliance on such general guidelines is proper, although the conventional criminal matrix from which these guidelines

originated does not approximate the exceptional circumstances presented in the instant litigation. For example, in *Neil v. Biggers, supra*, the defendant was convicted of rape on evidence that consisted in part of testimony concerning the victim's identification at a police lineup that occurred seven months after the rape. The Court opined: "There was to be sure, a lapse of seven months between the rape and the confrontation. This would be a seriously negative factor in most cases." *Id.* at 201. In the present case, the length of time between the events in question and the witness identifications is an extraordinary 34-35 years. Such a lengthy duration of course imposes on the Court a duty to scrupulously examine the eyewitness identifications offered in this case. However, the Court feels that a Procrustean application of the specific guidelines for testing photographic identifications in more conventional criminal prosecutions is unwarranted in the present case. Careful consideration of the Supreme Court precedents in this area reveals that the central consideration is the reliability of the identification in light of all the circumstances. *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 55 L.Ed.2d 140 (1977). The Court concludes from the totality of facts in this case that the six eyewitness identifications of defendant as the "Ivan" known from Treblinka are reliable.

Defendant first argues that the photo album, Government's Exhibit 17, shown to Rosenberg, Lewkowicz, Epstein and Rajgrodzki is inherently suggestive and created a substantial risk of misidentification of the defendant.[27] It will be recalled, that Rosenberg viewed a minimum of

---

27. The Court is aware that this same photo album was subjected to scrutiny in *U.S. v. Fedorenko*, 455 F.Supp. 893, 906 (S.D.Fla.1978) and was deemed impermissively suggestive. The photospread was compiled by Israeli police and contains photographs of individuals against whom war crimes accusations have been made. (Tr. 1153)

seventeen photographs from this album, Rajgrodzki all forty-three photographs, Lewkowicz a minimum of eight photographs, and Epstein also a minimum of eight photographs, before the pretrial identifications were made.

Government's Exhibit 17 consists of forty-three black and white photographs of varying size and quality, affixed to ten cardboard pages. The defendant's visa picture, # 16, is located at the bottom left of the third page along with seven other photographs on the page. Photograph # 17 directly to the right of defendant's photograph is that of Fedor Fedorenko, the defendant in *U.S. v. Fedorenko*. Defendant argues that this page is suggestive for several reasons. First, defendant's photograph was placed next to that of Fedorenko who was the only other person other than the defendant of the forty-three individuals depicted in the photospread suspected of being at Treblinka. Next, defendant observes that photographs # 16 and # 17 are larger than the other photographs on the page and that the visual images on these pictures are clearer than those of the other pictures on the page. It should be noted that over half the other photographs in the album are as large or larger than photographs # 16 and # 17 and share comparable visual quality.

The Court concludes that whatever suggestiveness may be present on the page containing defendant's photograph in no way tainted the identifications of Rosenberg and Rajgrodzki. Both witnesses looked at a sufficient number of photographs of size and quality comparable to those found on the page containing defendant's photograph and both witnesses selected defendant's visa photograph with unequivocal certainty. The identifications of Lewkowicz and Epstein were similarly positive and unequivocal. However, the possibility that the alleged suggestive characteristics contributed to these identifications is heightened by the

fact that, at a minimum, both witnesses may have viewed only the page containing defendant's photograph. Nonetheless, the Court does not find it necessary to determine the effects of the suggestiveness as unnecessary suggestibility alone does not require exclusion of the identification testimony. *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). An examination of the "totality of circumstances" in this case reveals the reliability of not only the identifications of Lewkowicz and Epstein, but also of the remaining witnesses.

It is uncontroverted that each of the witnesses had ample opportunity to view the individual known to them as "Ivan" at Treblinka. Each witness was stationed for extensive periods of time in camp 2 in close proximity to the gas chambers where Ivan worked. In addition, Rajchman, Rosenberg, and Epstein testified that they personally observed this individual commit atrocities at the camp. Rajgrodzki testified that Ivan once whipped him.

Thorough cross-examination of each witness failed to depreciate in any way the certainty of the identifications made by each witness. Each witness identified defendant as the Ivan known from Treblinka on the basis of defendant's visa photograph. In addition, four of five witnesses shown defendant's picture on the Trawniki card identified him. The fifth, Rajchman, who failed to select the photograph at a pretrial session did so in open court. There is no indication that the investigators conducting the identification procedures in any way suggested the identification of defendant's photographs. Nor is there any indication that world wide media coverage of this case containing alleged photographs of defendant prejudiced the identifications made by any witness.

Finally, in identifying defendant as "Ivan" each of the witnesses offered a physical description of the Ivan they

observed which is consistent with that of the defendant. Admittedly, these descriptions were given by the witnesses after they had viewed the photospreads. Comparison of the testimony reveals a few particular discrepancies but it may be fairly said that the following general description was offered by all the witnesses: young man, 22-25 years of age, tall, strong physique, dark or dark blonde hair.[28] The witnesses testified that the uniform worn by this individual was either black or dark brown. The use of both color types at Treblinka is likely.[29] It is important to note that several witnesses recalled features of Ivan which correspond to those of defendant and which are not recognizable from the photographs. For instance, Rosenberg correctly testified that Ivan's eyes were "grey" and Lewkowicz described Ivan's eyes as "light". (Tr. 535; 625) Rajgrodzki and Lewkowicz testified that Ivan's hair was dark blonde, which is the color indicated by the Trawniki card, Government's Exhibit 6. (Tr. 595, 633)

Defendant offered the testimony of one witness, Fedor Fedorenko, who was present at Treblinka during the years 1942-1943 as a Ukrainian guard. (Deposition of Fedor Fedorenko, March 7, 1981) Fedorenko was shown both defendant's Trawniki photograph and visa photograph and denied ever seeing the defendant at Treblinka. The Court finds that the testimony of Fedorenko is not credible. Fedorenko testified at his own trial that an "Ivan" operated the motors of the gas chambers. (Fedorenko Trial Transcript at pages 1458-59) However, at his deposition, Fedorenko claimed that he did not know such an Ivan or re-

---

28. Horn, Tr. 307-308; Rajchman, Tr. 473-475, 495; Rosenberg, Tr. 515-535; Rajgrodzki, Tr. 595-599; Lewkowicz, Tr. 612-625; Epstein, Tr. 653.

29. Dr. Scheffler testified that the guards at Trawniki received black uniforms originally and these were replaced later on by khaki or earth brown uniforms. (Tr. 116A) *See also* testimony of Schaefer (Tr. 192)

member his appearance. (Deposition at pages 17-18; 22-23; 62-63; 66) Fedorenko also testified that he was never in camp 2 at Treblinka or near the gas chambers. (Deposition at page 38) If this statement is accurate, Fedorenko would not have had the opportunity to observe the individual known as Ivan and so his failure to identify defendant's photographs is not surprising.[30]

In conclusion, based on an examination of all the factual circumstances the Court finds that none of the pretrial photographic identifications was so impermissibly suggestive as to give rise to a likelihood of misidentification and deny defendant due process of law. Since the Court finds both the pretrial and trial photographic identifications to be reliable, it must conclude that defendant was present at Treblinka in 1942-1943.[31]

D. Defendant's Testimony

Defendant has denied ever serving the Germans as a guard at Trawniki, Treblinka, or any other location in 1942-1943. Defendant testified that after being captured by the Germans in the Crimea, he was taken first to a POW camp at Rovno, in the Western Ukraine sometime in 1942 or 1943. (Tr. 1068) From Rovno, defendant indicates he was taken to a POW camp at Chelm, Poland,

---

30. The cross-examination of this witness revealed numerous inconsistencies which further detracted from his credibility.

31. Because the Court has found that defendant was present at both Trawniki and Treblinka, it is not necessary to determine whether defendant was ever present at the concentration camp of Sobibor, Poland. Government's Exhibit 6 shows that the defendant was detailed to Sobibor on March 27, 1943, but the circumstances and duration of this transfer are unknown. There was no eyewitness testimony presented that defendant served at Sobibor, although defendant stated on his application for immigration visa (Government's Exhibit 21) that he was in Sobibor from 1934-1943, working as a farmer. Defendant now admits that he lied on his visa application and claims that he was never at Sobibor during this period.

and remained here "until about 1943 or 1944." (Tr. 1069) The defendant testified that in 1944 he was transported to Graz, Austria, where he remained for three or four weeks. (Tr. 1069-1071) At Graz, defendant admitted that he was placed in a unit of the Ukrainian National Army, commanded by a General Shandruk, and organized by the Germans for later service against the Russians. (Tr. 1095-1096) According to defendant, although he was drilled in a unit, he never received a gun and never engaged in any military action while at Graz. (Tr. 1071; Deposition of February 20, 1980, at 66) While at Graz, defendant admitted that he received a blood group tattoo on the inside of his upper left arm. (Tr. 1070)

Defendant testified that he was transferred from Graz to a location known to him as Oelberg, Austria. (Tr. 1071) Defendant was uncertain as to the correct spelling of this location and neither the defendant nor the Government could locate an "Oelberg" in Austria. Nevertheless, defendant testified that he remained at Oelberg from approximately November 1944 until May 1945.[32] Defendant stated that he was placed by the Germans in a Russian National Army unit assigned to guard a captured Russian general. (Tr. 1099-1103) Aside from this duty, defendant claimed he engaged in no other military action. Finally, the defendant testified that he cut off the blood group tattoo he received at Graz while at Oelberg since "tattoos weren't given in the Russian National Army." (Tr. 1105-1106)

The credibility of defendant's testimony is severely undercut by the existence of Government's Exhibits 5 and

---

32. This chronology is derived from defendant's testimony that he was at Oelberg from 1944 until the week before the end of the war. (Tr. 1097) Germany surrendered to the Western Allies and Russia on May 8, 1945.

6 and the testimony of the other six Treblinka survivors which cumulatively show that defendant was present at Trawniki and Treblinka in 1942-1943. The Government attacked the credibility of defendant's testimony in several other ways. Expert testimony revealed that it was unlikely defendant was at a POW camp in Chelm, Poland, in the fall of 1944 as his testimony would indicate since the Russians had driven the Germans from Chelm by July 1944.[33] (Ziemke, Tr. 1129-1132) Expert testimony also revealed that General Shandruk, the general defendant claimed commanded the Ukrainian National Army at Graz in 1944, was not designated as the general of the Ukrainian National Army until March 1945. (Tr. 1134-1136)

Finally, defendant's admission that he had a blood group tattoo on the inside of his left arm raises serious questions. Only persons affiliated with the German SS were given such tattoos and it is unlikely that ordinary Russian POWs would be so marked. (Scheffler, Tr. 36-38) The International Refugee Organization (IRO), an agency established by the United Nations after the war to process thousands of displaced persons, recognized the significance of such tattoos, presumably because they would disqualify an individual from receiving any IRO assistance:

> "1. Tattooings. Tattooings which will be of value to the Field Eligibility personnel will fall normally in three categories which will be described below. The Nazi Government as a result of its desire to categorize as far as possible all of its manpower, instituted the system of tattooing whereby the elite could be differentiated from the normal personnel as well as from the undesirable.

---

33. According to the testimony of Dr. Ziemke, the latest possible period during which the Germans would have kept a POW camp at Chelm, Poland was January 1944.

"2. The various tattooing marks and their purposes were as follows:

(b) Members of the S.S. and the Waffen S.S. were tattooed with a blood mark underneath the left armpit. This blood group mark matched the blood group mark to be found on the S.S. persons [sic] filed at the S.S. Headquarters in Berlin. Again, whether or not an individual Waffen S.S. member had a blood group mark depended on the exigencies of the war and whether the facilities were available for tattooing. Frequently it occurred that persons who were conscripted in the latter days of the war were not tattooed because of the chaotic situation at the time."[34]

The Government argues that such a tattoo is additional evidence that defendant served the German SS at Trawniki and Treblinka. The Court, being unable to determine the accuracy of the Government's argument with certainty, must nevertheless observe that evidence of the blood group tattoo raises a final, serious doubt about the defendant's testimony concerning his whereabouts during the war.

It is undisputed that following the war, defendant was taken by American forces to several camps and eventually he arrived in Regensburg, Germany, where he drove a truck in an American Army motor pool from 1947-1949. (Tr. 1073)

---

34. *Manual for Eligibility Officers*, International Refugee Organization (IRO), at 115 (Govt. Ex. 1 attached to deposition of Daniel Segat, January 16, 1981) [henceforth IRO Manual]. Such a tattoo would be important as Annex I to the IRO Constitution, Part II, provided that persons who voluntarily assisted the enemy forces during the war would not be the concern of the IRO. 62 Stat. 3037, 3052 (1946)

E. Defendant's Immigration

It is necessary to review briefly postwar immigration procedures which are pertinent to this action. Following the conclusion of the war, the Allied armies became the guardians of about 8,000,000 persons including those liberated from extermination camps, former prisoners of war, and thousands of other persons dislocated by the hostilities. By 1948, 7,000,000 of these uprooted persons had been repatriated leaving approximately 1,000,000 persons in the United States, British, and French zones of Germany, Austria and Italy. S.Rep.No.950, 80th Cong., 2d Sess., U.S.Code Cong. Service 2028, 2035 (1948). Many of these people lived in camps operated by the International Refugee Organization (IRO), an organization founded in 1946 to offer care and assistance to the dislocated masses and to provide for their eventual repatriation. Part two of Annex I of the IRO Constitution, 62 Stat. 3037, 3051 (1946) provided that certain persons would *not* be the concern of the IRO:

"1. War criminals, quislings and traitors.

"2. Any other persons who can be shown:
(a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or

(b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations."

. . . .

In 1948, Congress enacted the Displaced Persons Act (DPA) to enable European refuges driven from their homelands to emigrate to the United States. Section 2(b) of the DPA, 62 Stat. 1009, defined a displaced person eligible

for emigration by incorporating the definition of "refugees or displaced persons" contained in Annex I to the IRO Constitution, *supra*. A person seeking a visa to the United States under the DPA normally followed a tripartite procedure.

First, a refugee filed an application for IRO assistance. The applicant was interviewed by an IRO eligibility officer who elicited information about the applicant's personal and family history, with especial emphasis on the war years, in order to determine whether the applicant was qualified under the IRO constitution, *supra*. (Tr. 700-702) The primary source of back-ground information inevitably came from the applicant himself. If qualified, the refugee was granted IRO assistance.

Next, the refugee sought to qualify as an eligible displaced person under the DPA. The Displaced Persons Commission was the agency in charge of implementing the DPA. Under sections 2(b) and 10 of the DPA, 62 Stat. 1009, 1013, positive eligibility under the IRO was a preliminary requisite. The IRO file containing the history of the particular refugee and the certification of IRO status was forwarded to the Displaced Persons Commission. A case analyst then made certain security checks on the background of the applicant to determine eligiblity under the DPA and issued a report certifying that the applicant was a person eligible for admission into the United States under the DPA. (Tr. 787-791)

Finally, the case analyst forwarded an applicant's file, containing both the preliminary IRO certification and the Displaced Persons Commission report to the appropriate American Consulate. The applicant appeared at the consular office and was matched with an interpreter-typist, who assisted the applicant in filling out the application for an immigration visa. A vice-consul at the American Con-

sulate reviewed the visa application and other documents in the applicant's file. The vice-consul then interviewed the applicant and, at a minimum, review with the applicant all the entries which appeared on the visa application. If the vice-consul determined that the applicant met the criteria of the DPA and other immigration laws, he issued the applicant a visa.[35] (Tr. 844-847)

In 1948 defendant initiated procedures to immigrate to the United States. He first applied for assistance to the IRO. In his IRO application (Exhibit 3 attached to defendant's deposition, February 20, 1980), defendant neither disclosed his service with the German SS at Trawniki and Treblinka, nor did he reveal, as he testified at trial, that he had served in a German military unit in 1944-1945. Questions 10 and 11 of the IRO application asked for defendant's place of residence and employment for the last twelve years. Defendant answered that from 1937-1943 he worked in Sobibor, Poland, and from 1943-1944 in Pilau, Germany. Defendant now admits that these statements were false. (Deposition of defendant, February 20, 1980, at 39)

In October 1950, defendant applied to the Displaced Persons Commission for consideration to immigrate to the United States. Defendant made the same misrepresenta-

---

35. Section 10 of the DPA was amended by § 9 of the Act of 1950, 64 Stat. 219, 225-226 (1950) to clearly allow the vice-consul to make the final determination of eligibility of applicants, both under the DPA and under the general immigration laws. Conference Report No. 2187, 81st Congress, 2d Sess., U.S. Code Cong. Service 2513-2523 (1950). Section 9 provided: "no person shall be issued an immigration visa or be admitted into the United States under this Act if the consular officer or the immigrant inspector knows or has reason to believe that the alien is subject to exclusion from the United States under any provision of the immigration laws or (1) is not a displaced person and an eligible displaced person, or (2) is not eligible under the terms of this Act. . . ."

tions, concealing his service with the German SS and the German military. Page three of the report issued by the Displaced Persons Commission, Government's Exhibit 20, concluded based upon the information furnished by the defendant that he had been a farmer at Sobibor, Poland from 1936 to 1943; worked at the harbor of Danzig, Germany from 1943 until May 1944; and worked in Munich, Germany from May 1944 to May 1945.[36]

Defendant filed his application for an immigration visa on December 27, 1951. (Government's Exhibit 21) Defendant admits he misrepresented under oath his whereabouts and activities during the war. (Tr. 1084-1086) Defendant listed his residences during the period in question as follows: 1934-1943 Sobibor, Poland; 1943-September 1944 Pilau/Danzig, Germany; September 1944-May 1945 Munich, Germany. In addition, defendant misstated his birthplace as Kiev, U.S.S.R. and his nationality as Polish/Ukrainian.[37]

Defendant testified that he made these misrepresentations during his immigration to avoid being repatriated to the U.S.S.R. because of his prior service in the Russian army. (Tr. 1081-1082)

Defendant was granted a visa and entered the United States for legal residence on February 9, 1952.

F. Defendant's Naturalization

Defendant applied to the Immigration and Naturalization Service (I.N.S.) for naturalization as an American

---

36. The case analyst, Leo Curry, responsible for submitting this report for the Displaced Persons Commission testified on behalf of the Government at trial. (Tr. 779 *et seq.*)

37. The vice-consul who processed defendant's visa application, Harold Henrikson, testified on behalf of the Government at trial. (Tr. 839 *et seq.*)

citizen in 1958.[38] Defendant submitted his application to file petition for naturalization. (Government's Exhibit 25A) In processing defendant's application, the I.N.S. checked his immigration and visa file to verify that defendant's entry into the United States was lawful, as lawful entry is a prerequisite for naturalization. (Tr. 870-871; 885-886) An interview was conducted with defendant by a naturalization examiner on August 12, 1958, to review the contents of defendant's naturalization application. This interview was conducted under oath. At the time defendant again stated that the contents of his naturalization application were true, including his answer to question 23, in which he denied having given "false testimony for the purpose of obtaining any benefits under the immigration and naturalization laws."

On November 14, 1958, the United States District Court for the Northern District of Ohio, without knowledge of defendant's true activities and whereabouts during the war, naturalized the defendant. At his naturalization, defendant changed his first name from "Ivan" to "John."

CONCLUSIONS OF LAW

Section 340(a) of the Immigration and Nationality Act, 8 U.S.C. § 1451(a), provides that a naturalized citizen may be denaturalized if the naturalization was "illegally procured" or "procured by concealment of a material fact or by willful misrepresentation." The Government argues that defendant can be denaturalized under both standards.

---

38. Donald Prichard, a former naturalization examiner in the Cleveland office of I.N.S. during the period in which defendant was naturalized, testified concerning the naturalization process. (Tr. 866 *et seq.*)

A. Citizenship Illegally Procured

Congress has been entrusted by the Constitution with the authority to establish the terms and conditions upon which aliens can be naturalized.[39] Consequently, no alien has the right to naturalization unless all the statutory requirements have been complied with. *Maney v. U. S.*, 278 U.S. 17, 22, 49 S.Ct. 15, 73 L.Ed. 156 (1928); *U. S. v. Ginsberg*, 243 U.S. 472, 475, 37 S.Ct. 422, 425, 61 L.Ed. 853 (1917). Naturalization is "illegally procured" if some statutory requirement which is a condition precedent to naturalization is absent at the time the petition for naturalization is granted. H.R.Rep.No.1086, 87th Cong., 1st Sess. 39, *reprinted in* U.S.Code & Ad.News 2950, 2983 (1961).

When defendant filed his petition for naturalization in 1958, § 318 of the Immigration and Nationality Act, 8 U.S.C. § 1429, provided that no person could be naturalized unless he had been lawfully admitted to the United States for permanent residence.[40] A valid immigration visa was necessary to obtain lawful residence in this country.[41]

The Court views the recent Supreme Court decision, *Fedorenko v. U. S.*, 449 U.S. 490, 101 S.Ct. 737, 66 L.Ed.2d

---

39. Congress is empowered to "establish an uniform Rule of Naturalization" under Article I, Section 8, Clause 4.

40. *See also* § 316(a), 8 U.S.C. § 1427(a): "No person, except as otherwise provided in this title, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has resided continuously, *after being lawfully admitted for permanent residence*, ..." (emphasis added)

41. At the time of defendant's immigration, § 13(a) of the Immigration Act of 1924, ch. 190, 43 Stat. 153, 161 (repealed in 1952) provided that "[n]o immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa. . . ." Courts interpreting § 13(a) held that a visa obtained through a material misrepresentation was not valid. *Ablett v. Brownell*, 240 F.2d 625, 629 (D.C.Cir.1957); *U. S. v. Shaughnessy*, 186 F.2d 580, 582 (2d Cir. 1951).

686 (1981), as dispositive of the issue of whether defendant illegally procured his citizenship. In that case, Fedorenko, an admitted guard for the German SS at both Trawniki and Treblinka, concealed this information from immigration officials and obtained a visa. The Supreme Court concluded that Fedorenko's failure to disclose the true facts about his service as an armed guard at Treblinka would have made him ineligible as a matter of law for a visa under the Displaced Persons Act. The Court's interpretation of several provisions of the DPA is relevant to the instant action.

Section 10 of the DPA, 62 Stat. 1013, provided: "[a]ny person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States." The Supreme Court interpreted this provision to apply to willful misrepresentations of "material" facts and indicated that "at the very least, a misrepresentation must be considered material if disclosure of the true facts would have made the applicant ineligible for a visa." *Id.* 101 S.Ct. at 749. Fedorenko's failure to reveal his past service as an armed guard at Treblinka was found by the Court to be material since, under § 2(b) of the DPA and the IRO Constitution, service as a concentration camp guard, whether voluntary or involuntary, would have prevented anyone from obtaining a visa. The DPA made all those who "assisted the enemy in persecuting civil populations" ineligible for visas. *Id.* at 748-751. Since Fedorenko had failed to satisfy a statutory prerequisite to the acquisition of citizenship—lawful admission for permanent residence in this country—his citizenship was revoked as "illegally procured." *Id.* at 752.

This Court previously concluded, *supra*, that the Government has shown by clear and convincing evidence that

defendant served the German SS as a guard at both Trawniki and Treblinka in 1942-1943 and willfully misrepresented this service on his visa application. Harold Henrikson, the vice-consul responsible for processing defendant's visa application, testified that if an applicant had told him either (1) that he had served in a training camp such as Trawniki run by the German SS for the purpose of training guards for duties at extermination camps or (2) that he had served as a guard at an extermination camp, Henrikson would have denied such individual a visa under the DPA.[42]

In light of this testimony and the Supreme Court's opinion in *Fedorenko*, this Court must conclude that defendant's failure to disclose his service under the German SS at Trawniki and his later service as an armed guard at Treblinka were material misrepresentations under §§ 2(b) and 10 of the DPA. Since defendant was ineligible for a visa under the DPA, his citizenship must be revoked as

---

42. "Q. If an applicant stated during an interview that he was formerly a Soviet solider, captured by the Germans, taken to a prisoner of war camp and thereafter recruited and trained at a training camp run by the Nazi SS for the purpose of training guards for duties at extermination camps and for use in other operations against the Jewish population, what effect, if any would this have on his eligibility to obtain a visa?

"A. I would deny the visa.

"Q. Upon what do you base this opinion?

"A. Well, my general recollection of the Displaced Persons Program and of the Displaced Persons Act is that it was not intended to benefit those who had aided, abetted and helped the Germans in their subjugation of Europe and their persecution of civilian population, and I would think that anybody who was connected with the SS in any way would be, in my opinion, ineligible for a visa.

"Q. Given the same facts except this time the individual stated to you he worked under the SS in an extermination camp.

"A. That would be a stronger case.

"Q. What would have happened?

"A. He would have been denied a visa." (Tr. 854-855)

"illegally procured" because he failed to satisfy a statutory prerequisite of naturalization.[43]

The Court rejects defendant's argument that he gave false statements on his visa application because he was afraid of repatriation to the Soviet Union.[44] The Fifth Circuit in *Fedorenko*, 597 F.2d 946, 953 (1979), rejected a similar defense and the Supreme Court, although not di-

---

43. The Court's conclusion that defendant illegally procured his naturalization may be reached in a less elliptical manner. Section 13 of the DPA was amended in 1950, 64 Stat. 227, to provide: "No visa shall be issued under the provisions of this Act as amended . . . *to any person who advocated or assisted in the persecution of any person because of race, religion, or national origin*, or to any person who has voluntarily borne arms against the United States during World War II." (emphasis added) Leo Curry, the case analyst who granted defendant status under the DPA, testified that if defendant had disclosed either his service at Trawniki or Treblinka, he would have been found ineligible by the DPA and refused admission to the United States under § 13. (Tr. 796-797)

44. After the war, there was a sharp divergence of viewpoint between the U.S. Government and the U.S.S.R. as to the repatriation policy to be followed concerning displaced persons born in areas subject to the governmental authority of the U.S.S.R. The U.S.S.R. demanded that the other Allied powers forcibly repatriate these persons while the U.S. opposed any such efforts. H.R.Rep.No.1854, 80th Cong., 2d Sess. 7 (1948). Testimony at trial indicated that forcible repatriation did occur early after the war, from May 22-September 30, 1945 when over two million persons were repatriated to the U.S.S.R. (Tr. 1045-1047) A former eligibility officer for the IRO testified that incidents of forcible repatriation also occurred until 1948. (Tr. 976) It is undeniable, therefore, that certain fears concerning possible forcible repatriation did permeate the refuge camps. However, Dr. Edward O'Connor, formerly a commissioner on the Displaced Persons Commission, indicated that it was the policy of the U.S. Government to oppose forcible repatriation and that such repatriation was stopped by a Presidential proclamation in the fall of 1945. (Tr. 1047, 1057). The IRO Constitution also allowed for individual freedom of choice with respect to repatriation, and a refugee could avoid being repatriated by stating a valid objection to returning to his country of origin. Annex I, Part I, Section C of IRO Constitution, 62 Stat. 3050 (1946). Finally, defendant himself admitted that after 1947 his fear of being forcibly repatriated to the Soviet Union has subsided. (Tr. 108) Defendant did not fill out his IRO application until 1948 and his visa application until 1951.

rectly addressing the issue, opined that the fact that Fedorenko gave false statements because he was motivated by fear of repatriation "indicates that he understood that disclosing the truth would have affected his chances of being admitted to the United States and confirms that his misrepresentation was willful." 101 S.Ct. 748 at n.26. The Supreme Court reaffirmed prior cases which rejected lower court efforts to moderate the statutory mandate of Congress in denaturalization proceedings. "[O]nce a district court determines that the Government has met its burden of proving that a naturalized citizen obtained his citizenship illegally or by willful misrepresentation, it has no discretion to excuse the conduct." 101 S.Ct. 753.[45]

B. Naturalization Obtained by Concealment Of A Material Fact Or By Willful Misrepresentation

The Court alternatively finds that defendant's certificate of naturalization must be canceled under section 340(a), 8 U.S.C. § 1451(a) as it was procured by "concealment of a material fact or by willful misrepresentation." Denaturalization may be invoked for concealment of material facts or willful misrepresentation of material facts.

---

45. The Court also finds that defendant illegally procured his citizenship because he lacked the good moral character required under Section 316(a) of the Immigration and Nationality Act, 8 U.S.C. § 1427(a). In determining good moral character, "the court shall not be limited to the petitioner's conduct during the five years preceding the filing of the petition, but may take into consideration as a basis for such determination the petitioner's conduct and acts at any time prior to the period." 8 U.S.C. § 1427(e). Specifically, the Court concludes that defendant's misrepresentations on his visa application concerning his service with the German SS at Trawniki and Treblinka precluded him from establishing good moral character under Section 101(F), 8 U.S.C. § 1101(f): "No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is or was—. . . (6) one who has given false testimony for the purpose of obtaining any benefits under this Act; . . . ."

Costello v. U. S., 365 U.S. 265, 272 at n.3, 81 S.Ct. 534, 538, 5 L.Ed.2d 551 (1961). The definition of "materiality" under § 1451(a) was posited by the Supreme Court in *Chaunt v. U. S.*, 364 U.S. 350, 81 S.Ct. 147, 5 L.Ed.2d 120 (1960). In *Chaunt*, the Court stated that to prove misrepresentation or concealment of a material fact the Government must prove by clear and convincing evidence *either* (1) that facts were suppressed which, if known, would have warranted denial of citizenship *or* (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship. *Id.* at 355, 81 S.Ct. at 150.[46]

None of the questions in defendant's 1958 application for citizenship (Govt. Ex. 25A) explicitly required defendant to divulge his service at Trawniki and Treblinka in 1942-1943. However, question 23 inquired whether defendant had "given false testimony for the purpose of obtaining any benefits under the immigration and nationality laws." In reply, defendant falsely answered "no." Had defendant answered in the affirmative, further elaboration was required.[46A]

---

46. The Supreme Court recently declined to address a problem which has arisen concerning the interpretation and viability of the second *Chaunt* standard of materiality. *Fedorenko v. U. S.*, 449 U.S. 490, 101 S.Ct. 737, 753 at n.40, 66 L.Ed.2d 686 (1981). At issue is whether the Government must always demonstrate the existence of disqualifying facts—facts that themselves would warrant denial of citizenship—in denaturalization actions under § 1451, or whether the Government need only prove that disclosure of the true facts would have led to an investigation that might have uncovered other facts warranting denial of citizenship. *Compare U. S. v. Rossi*, 299 F.2d 650, 652-53 (9th Cir. 1962) *with U. S. v. Fedorenko*, 597 F.2d 946, 950 (5th Cir. 1979); *Kassab v. I.N.S.*, 364 F.2d 806, 807 (6th Cir. 1966); *U. S. v. Oddo*, 314 F.2d 115, 118 (2d Cir.), *cert. den.*, 375 U.S. 833, 84 S.Ct. 50, 11 L.Ed.2d 63 (1963); *Langhammer v. Hamilton*, 295 F.2d 642, 648 (1st Cir. 1961).

46A. When the applicant lies in response to a direct question, his deception is covered by the "willful misrepresentation" language of the statute. 3 Gordon and Rosenfield, Immigration Law and Procedure § 20.4b, at 20-14 (1980).

By denying he had ever given false testimony in obtaining his visa, defendant suppressed facts concerning his whereabouts during the war, which, if known, would have warranted denial of his petition for naturalization. A former naturalization examiner testified that when an application for naturalization is filed, the first step is to determine whether the applicant was lawfully admitted for permanent residence. (Pritchard, Tr. 870) As previously indicated, defendant's service for the German SS at Trawniki and Treblinka disqualified him for lawful permanent residence under the Displaced Persons Act. Defendant's false answer to question 23 therefore suppressed the existence of these disqualifying facts which, if disclosed, would have resulted in a denial of his petition for naturalization.[47] Consequently, defendant's naturalization must also be revoked because it was procured by a willful misrepresentation of material facts.[48]

---

47. Defendant's false answer to question 23 would also have made him ineligible for citizenship since his service with the German SS at Trawniki and Treblinka and the concealment of this service on his visa application, if disclosed at the time defendant filed his application for naturalization, would have revealed that defendant lacked the good moral character required by 8 U.S.C. §§ 1101(f) and 1427(a).

48. The Court finds it unnecessary to decide whether defendant's admitted service in German organized Russian and Ukrainian military units would, considered alone, also justify denaturalization. The defendant testified that he was involuntary conscripted into these units and never engaged in combat while a member of the units. Section 2(b) of the DPA, defining "displaced person" in reference to the IRO Constitution, specifically excluded individuals who had "voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations." Annex I, Part II, IRO Constitution, 62 Stat. 3051-3052. In 1950, § 13 of the DPA was amended to include a provision disqualifying from immigration "any person who has voluntarily borne arms against the United States during World War II." 64 Stat. 227. Legislative history shows that this amendment was meant to apply only to aliens who voluntarily bore arms against the United States on the western front. Conf.Rep.No.2187, 81st Cong., 2d Sess. 16, *reprinted in* U.S. Code Cong. Service 2513, 2524 (1950). *See also,*

(Continued on following page)

MOTION FOR NEW TRIAL

Following the trial of this matter but before the Court rendered its decision, defendant requested that a new trial be granted. Defendant's motion for a new trial, styled as a motion for a mistrial, essentially argues that the Government failed to comply with certain pretrial discovery requests and consequently defendant was deprived of information necessary for his defense. On May 4, 1981, the Court held a hearing on defendant's motion. Defendant's allegations have been carefully reviewed. The Court concludes that defendant's motion for a new trial should be denied.

Defendant's request for a new trial is based on a letter received from Government counsel at the conclusion of the trial.[49] The letter indicated that shortly before trial, the Government received statements of five witnesses from the U.S.S.R. The witnesses were interviewed by Soviet authorities at the request of the Government although Government counsel did not speak directy to the witnesses or have any personal contact with them. All five witnesses were present at the Trawniki training camp at various times in 1942.[50] One of the witnesses, Nikolai Dorofeev,

---

Footnote continued—

96 Cong.Rec. 8221 (1950). Under either provision, the major touchstone was the "voluntary" nature of the service performed. The simple assertion by an applicant, either seeking IRO eligibility or displaced person status, that he served involuntarily in a German unit raised serious questions because the applicant bore the burden of proof concerning the "voluntariness" of his service. *See* IRO Manual, *supra*, at 6; § 10 of the Displaced Persons Act, as amended, 62 Stat. 1013. Expert testimony of immigration officials uniformly indicated that an applicant's unsubstantiated contention of involuntary service was disbelieved. (Tr. 709-710; 797-801; 859-860)

49. A copy of the letter was also forwarded to the Court.

50. Two of the witnesses later served at the Treblinka labor camp. This camp was a separate installation located several kilometers away from the extermination camp where defendant allegedly was present. *See* statements of S. E. Kharkovsky and A. N. Kolgushkin.

stated that he remembered the defendant from Trawniki and identified two photographs of the defendant. The remaining witnesses had no recollection of the defendant. The letter explained that the statements had been received just prior to trial and that it had been impossible to obtain either the live or deposition testimony of the Soviet witnesses. Government counsel noted he was not requesting that the statements be made part of the trial record, but rather he was informing defendant's counsel of the existence of the statements "so that the record of discovery in this case is complete."

Defendant complains that the information offered by the Government in this letter was previously requested in various interrogatories and that the Government had a duty to provide the names of these Soviet witnesses seasonably, before trial, by supplementing its prior answers to interrogatories under Fed.R.Civ.P. 26(e)(1)(A).[51] Specifically, question one of defendant's first set of interrogatories, January 24, 1978, required the Government to state the name and address of every person known to the Government who had any knowledge of the alleged actions of the defendant.

Ordinarily, the duty to supplement responses under Rule 26(e) concerning the identity and location of persons having knowledge of discoverable matters arises "because of the obvious importance to each side of knowing all witnesses and because information about witnesses

---

51. Fed.R.Civ.P. 26(e)(1)(A) provides in pertinent part:

"A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, ..."

routinely comes to each lawyer's attention." Advisory Committee's Note, 48 F.R.D. 508 (1969). The Court is not insensitive to the additional consideration in the instant case that the defendant was necessarily dependent on United States govermental agencies for assistance in obtaining relevant information from Soviet authorities.

The Court finds that the Government had a duty under Fed.R.Civ.P. 26(e)(1)(A) to disclose the identity of one witness, Nikolai Dorofeev, by supplementing its response to the defendant's 1978 interrogatory request. Dorofeev's statement reflects, at the least, a tentative recollection of the defendant from the Trawniki training camp. This case involves events which allegedly occurred in 1942-1943 with potential eyewitnesses scattered throughout the world. In cases of such an exceptional nature it is especially important that the Government strictly comply with specific discovery requests concerning the identity and location of witnesses with knowledge of facts related to the Government's allegations.[52] Careful scrutiny of the statements of the other Soviet witnesses reveals that only Dorofeev has any potential knowledge of the alleged actions of the defendant. The four remaining witnesses expressly denied knowing the defendant while at Trawniki and failed to identify photographs of the defendant. The Government did not, therefore, breach any duty under Rule 26(e)(1)(A) with respect to these four witnesses.

---

52. In finding that the Government breached its duty under Fed.R.Civ.P. 26 to supplement its prior discovery responses, the Court does not ascribe any sinister motivation to Government counsels' conduct. The Government asserted its belief that any duty it had to supplement its answers to the 1978 interrogatory was modified by defendant's subsequent interrogatories specifically seeking the identities of any Soviet witnesses whom the Government intended to depose or call as witnesses at trial. *See* question 4, defendant's fourth set of interrogatories, April 14, 1980.

Defendant argues that he has been prejudiced by the Government's failure to seasonably supplement his discovery requests and is entitled to a new trial. Undoubtedly, the Court has discretion to ameliorate any prejudice caused by the Government's failure to suppement the defendant's discovery requests. 8 Wright & Miller, Federal Practice and Procedure § 2050 (1970). In this regard, it is appropriate to evaluate the quality of the potential evidence Dorofeev or the other Soviet witnsses might contribute in order to determine whether defendant's trial has been prejudiced to the extent alleged.[53] Certainly, evidence which is cumulative in nature or which merely affects, in some insignificant respect, the credibility of evidence already considered should not justify a new trial at this stage of the proceedings.[54]

The Court does not believe that the potential testimony of Dorofeev or of any of the other Soviet witnesses is of such a nature as to alter the outcome in the case. Defendant contends that the testimony of these Soviet witnesses might in some way discredit the authenticity of the Trawniki card, Government's Exhibits 5 and 6. The Court must reiterate that at no time during the trial was any evidence introduced which brought into question the authenticity of the Trawniki card. In fact, an examination of the statements taken from the Soviet witnesses tends to corroborate the existence of such identification cards and therefore the authenticity of Government's Exhibits 5 and 6. Three of the Soviet witnesses stated that upon

---

53. Even though the Court has found that the Government need only have provided defendant with the identity of Dorofeev, in light of the exceptional circumstances in this case, the Court has also examined the statements of the remaining Soviet witnesses for any evidence which might mandate a new trial.

54. *Cf.* motion for a new trial under Fed.R.Civ.P. 59 on the basis of newly discovered evidence. *Thomas v. Nuss*, 353 F.2d 257, 259 (6th Cir. 1965); 6A Moore's Federal Practice ¶ 59.08[3], at 59-118 (2d ed. 1979).

entering the Trawniki camp a form was filled out which contained a photograph and biographical data of each soldier.[55] It is important to emphasize that the Government did not base its allegation that defendant served at Trawniki on eyewitness testimony. The Government's proof of defendant's service at Trawniki is documentary, Government's Exhibits 5 and 6, and the authenticity of these documents, although merely questioned by the defendant, has not been impugned by even a scintilla of evidence. On the other hand, the Government established by sufficient evidence that these documents are authentic.

Review of the remaining information contained in the five witness statements reveals evidence which simply corroborates the testimony offered by the Government at trial concerning the capture of Soviet soldiers on the eastern front, their placement in German POW camps such as Chelm and Rovno, the transfer of Soviet soldiers from these POW camps to the SS training camp of Trawniki, the nature of the Trawniki camp, and the use of Trawniki personnel by the Germans in various operations persecuting the Jewish population.

The Court concludes, therefore, that the defendant is not entitled to a new trial because of the Government's tardy revelation of Dorofeev and the other Soviet witnesses. An examination of the witnesses' statements reveals evidence which is cumulative and not of such character that would probably produce a different result on a new trial.[56]

---

55. *See* statements of S.E. Kharkovsky, A.N. Kolgushkin and V.V. Orlovsky. Defendant's suggestion that the identification forms also contained the soldier's fingerprints is not supported by the Soviet witnesses' statements.

56. In light of all the surrounding circumstances and for the reasons set forth above, the Court does not find it necessary to reopen the case to take the testimony of any of the five Soviet witnesses. 6A Moore's Federal Practice ¶ 59.04[13], at 59-30 (2d ed. 1979).

Alternatively, the defendant requests a new trial for the following reason. After trial was completed, defense counsel obtained a copy of an affidavit of Chaim Sztajer, a survivor of the extermination camp at Treblinka. Sztajer, a resident of Australia, saw a photograph in a local newspaper of another individual who is presently confronted with denaturalization proceedings in the United States similar to the instant case.[57] On September 2, 1980, Sztajer submitted an affidavit for use in this other proceeding in which he stated that the photograph of the person he saw in the Australian papers was that of the man known to him at Treblinka as "Ivan."

Defendant charges the Government with failing to provide him with information of this apparent misidentification despite discovery requests for such information. Defendant's allegation, ominous at first glance, must be considered specious on closer examination. Defendant's fourth set of interrogatories, April 14, 1980, question 11, sought the names and addresses of each person who had viewed photospreads including a photograph of the defendant and who had failed to identify the defendant. In May 1980, the Government answered this interrogatory and provided defendant with the names and addresses of twelve survivors of Treblinka, including that of Chaim Sztajer. Defendant apparently never contacted Sztajer or sought additional discovery concerning information Sztajer might possess.

Consequently, the Court does not believe that the effects of defendant's lack of diligence in pursuing information offered at an earlier date should be visited upon the Government at this time. Defendant's motion for a new trial on this alternative ground is therefore denied.

---

57. Government counsel in the present litigation is also trial counsel in the other denaturalization proceedings referred to above.

CONCLUSION

For the reasons set forth above, the Court finds that the November 14, 1958 order of the United States Court for the Northern District of Ohio, admitting the defendant, John Demjanjuk, to citizenship of the United States of America, is hereby revoked and vacated and his Certificate of Naturalization, Number 7997497, is canceled on the grounds that such order and Certificate were illegally procured and were procured by willful misrepresentation of material facts under 8 U.S.C. § 1451(a). Accordingly, judgment will be entered in favor of plaintiff United States of America and against defendant John Demjanjuk.

IT IS SO ORDERED.

APPENDIX C

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Constitution of the United States

ARTICLE III

Section 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States; —between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

AMENDMENT V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor

shall private property be taken for public use without just compensation.

AMENDMENT VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

AMENDMENT XIV

Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

8 U.S.C. § 1251

§ 1251. Deportable aliens

(a) General classes

Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States;

(3) hereafter, within five years after entry, becomes institutionalized at public expense because of mental disease, defect, or deficiency unless the alien can show that such disease, defect, or deficiency did not exist prior to his admission to the United States;

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefore in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;

(5) has failed to comply with the provisions of section 1305 of this title unless he establishes to the satisfaction of the Attorney General that such failure

was reasonably excusable or was not willful, or has been convicted under section 1306(c) of this title, or under section 36(c) of the Alien Registration Act, 1940, or has been convicted of violating or conspiracy to violate any provision of sections 611 to 621 of title 22, or has been convicted under section 1546 of title 18;

(6) is or at any time has been after entry, a member of any of the following classes of aliens:

(A) Aliens who are anarchists;

(B) Aliens who advocate or teach, or who are members of or affiliated with any organization that advocates or teaches, opposition to all organized government;

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States; (ii) any other totalitarian party of the United States; (iii) the Communist Political Association; (iv) the Communist or any other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt; *Provided*, That nothing in this paragraph, or in any other provision of this chapter, shall be construed as declaring that the Communist Party does not advocate the overthrow of Government of the United States by force, violence, or other unconstitutional means;

(D) Aliens not within any of the other provisions of this paragraph who advocate the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, or who are members of or affiliated with any organization that advocates the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, either through its own utterances or through any written or printed publications issued or published by or with the permission or consent of or under the authority of such organization or paid for by the funds, of, or funds furnished by, such organization;

(E) Aliens not within any of the other provisions of this paragraph, who are members of or affiliated with any organization during the time it is registered or required to be registered under section 786 of title 50, unless such aliens establish that they did not have knowledge or reason to believe at the time they became members of or affiliated with such an organization (and did not thereafter and prior to the date upon which such organization was so registered or so required to be registered have such knowledge or reason to believe) that such organization was a Communist organization;

(F) Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches (i) the overthrow by force, violence, or other unconstitutional means of the Government of the United States or of all forms of law; or (ii) the duty, necessity, or pro-

priety, of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage;

(G) Aliens who write or publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, publication, distribution, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating or teaching (i) the overthrow by force, violence, or other unconstitutional means of the Government of the United States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage; or (v) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship;

(H) Aliens who are members of or affiliated with any organization that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, pub-

lished, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display any written or printed matter of the character described in paragraph (G) of this subdivision;

(7) is engaged, or at any time after entry has engaged, or at any time after entry has had a purpose to engage, in any of the activities described in paragraph (27) or (29) of section 1182(a) of this title, unless the Attorney General is satisfied, in the case of any alien within category (C) of paragraph (29) of section 1182(a) of this title, that such alien did not have knowledge or reason to believe at the time such alien became a member of, affiliated with, or participated in the activities of the organization (and did not thereafter and prior to the date upon which such organization was registered or required to be registered under section 786 of title 50 have such knowledge or reason to believe) that such organization was a Communist organization;

(8) in the opinion of the Attorney General, has within five years after entry become a public charge from causes not affirmatively shown to have arisen after entry;

(9) was admitted as a nonimmigrant and failed to maintain the nonimmigrant status in which he was admitted or to which it was changed pursuant to section 1258 of this title, or to comply with the conditions of any such status;

(10) entered the United States from foreign contiguous territory or adjacent islands, having arrived there on a vessel or aircraft of a nonsignatory transportation company under section 1228(a) of this title

and was without the required period of stay in such foreign contiguous territory or adjacent islands following such arrival (other than an alien described in section 1101(a)(27)(A) of this title and aliens born in the Western Hemisphere);

(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate;

(12) by reason of any conduct, behavior or activity at any time after entry became a member of any of the classes specified in paragraph (12) of section 1132(a) of this title; or is or at any time after entry has been the manager, or is or at any time after entry has been connected with the management, of a house of prostitution or any other immoral place;

(13) prior to, or at the time of any entry or at any time within five years after any entry, shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law;

(14) at any time after entry, shall have been convicted of possessing or carrying in violation of any law any weapon which shoots or is designed to shoot automatically or semiautomatically more than one shot without manual reloading, by a single function of the trigger, or a weapon commonly called a sawed-off shotgun;

(15) at any time within five years after entry, shall have been convicted of violating the provisions of title I of the Alien Registration Act, 1940;

(16) at any time after entry, shall have been convicted more than once of violating the provisions of title I of the Alien Registration Act, 1940; or

(17) the Attorney General finds to be an undesirable resident of the United States by reason of any of the following, to wit: has been or may hereafter be convicted of any violation or conspiracy to violate any of the following Acts or parts of Acts or any amendment thereto, the judgment on such conviction having become final, namely: an Act entitled "An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes", approved June 15, 1917, or the amendment thereof approved May 16, 1918; sections 791, 792, 793, 794, 2388, and 3241, of title 18; an Act entitled "An Act to prohibit the manufacture, distribution, storage, use, and possession in time of war of explosives, providing regulations for the safe manufacture, distribution, storage, use, and possession of the same, and for other purposes", approved October 6, 1917; an Act entitled "An Act to prevent in time of war departure from and entry into

the United States contrary to the public safety", approved May 22, 1918; section 1185 of this title; an Act entitled "An Act to punish the willful injury of destruction of war material or of war premises or utilities used in connection with war material, and for other purposes", approved April 20, 1918; sections 2151, 2153, 2154, 2155, and 2156 of title 18; an Act entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States", approved May 18, 1917, or any amendment thereof or supplement thereto; the Selective Training and Service Act of 1940; the Selective Service Act of 1948 [50 App. U.S.C. 451 et seq.]; the Universal Military Training and Service Act [50 App. U.S.C. 451 et seq.]; an Act entitled "An Act to punish persons who make threats against the President of the United States", approved February 14, 1917, section 871 of title 18; an Act entitled "An Act to define, regulate, and punish trading with the enemy, and for other purposes", approved October 6, 1917, or any amendment thereof;[1] the Trading With the Enemy Act; section 6 of the Penal Code of the United States; section 2384 of title 18; has been convicted of any offense against section 13 of the Penal Code of the United States committed during the period of August 1, 1914, to April 6, 1917, or of a conspiracy occurring within said period to commit an offense under said section 13 or of any offense committed during said period against the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890, in aid of a belligerent in the European war; section 960 of title 18; or

---

1. So in original. The semicolon probably should be replaced with "known as".

(18) has been convicted under section 1328 of this title or under section 4 of the Immigration Act of February 5, 1917.

§ 1251. General classes of deportable aliens [Addition Since May, 1982]

(a) [Preliminary matter unchanged]

(1)-(16) [Unchanged]

(17) the Attorney General finds to be an undesirable resident of the United States by reason of any of the following, to wit: has been or may hereafter be convicted of any violation or conspiracy to violate any of the following Acts or parts of Acts or any amendment thereto, the judgment on such conviction having become final, namely: an Act entitled "An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes," approved June 15, 1917, or the amendment thereof approved May 16, 1918; section 791, 792, 793, 794, 2388, and 3241, title 18, United States Code [18 USCS §§ 792-794, 2388, 3241]; and Act entitled "An Act to prohibit the manufacture, distribution, storage, use, and possession in time of war of explosives, providing regulations for the safe manufacture, distribution, storage, use, and possession of the same, and for other purposes," approved October 6, 1917 [50 USCS §§ 121 et seq.]; an Act entitled "An Act to prevent in time of war departure from and entry into the United States contrary to the public safety," approved May 22, 1918; section 215 of this Act [8 USCS § 1185]; an Act entitled "An Act to punish the willful injury or destruction of war material or of war premises or utilities used

in connection with war material, and for other purposes," approved April 20, 1918; sections 2151, 2153, 2154, 2155, and 2156 of title 18, United States Code [18 USCS §§ 2151, 2153-2156]; an Act entitled "An Act to authorize the President to increase temporarily the Military establishment of the United States," approved May 18, 1917, or any amendment thereof or supplement thereto; the Selective Training and Service Act of 1940; the Selective Service Act of 1948 [50 USCS Appx. §§ 451 et seq.]; the Universal Military Training and Service Act [50 USCS Appx. §§ 451, et seq.]; an Act entitled "An Act to punish persons who make threats against the President of the United States," approved February 14, 1917; section 871 of title 18, United States Code [18 USCS § 871]; an Act entitled "An Act to define, regulate, and punish trading with the enemy, and for other purposes," approved October 6, 1917, or any amendment thereof [known as] the Trading With the Enemy Act [50 USCS Appx. §§ 1-6, 7-14, 16-39]; section 6 of the Penal Code of the United States; section 2384 of title 18, United States Code [18 USCS § 2384]; has been convicted of any offense against section 13 of the Penal Code of the United States committed during the period of August 1, 1914, to April 6, 1917, or of a conspiracy occurring within said period to commit an offense under said section 13 or of any offense committed during said period against the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890 [15 USCS §§ 1-7], in aid of a belligerent in the European war; section 960 of title 18, United States Code [18 USCS § 960];

(18) has been convicted under section 278 of this Act [8 USCS § 1328] or under section 4 of the Immigration Act of February 5, 1917; or

(19) during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with—

(A) the Nazi government of Germany,

(B) any government in any area occupied by the military forces of the Nazi government of Germany,

(C) any government established with the assistance or cooperation of the Nazi government of Germany, or

(D) any government which was an [illegible] of the Nazi government of Germany,

ordered, incited, assisted, or otherwise, participated in the persecution of any person because of race, religion, national origin, or political opinion.

(b)-(e) [Unchanged]

(f) Relationship to United States citizen or lawfully admitted alien as affecting deportation for fraudulent entry. (1)(A) The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure or have procured visas or other documentation, or entry into the United States, by fraud or misrepresentation, whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than alien described in subsection (a)(19)) who—

(i) is the spouse, parent, or child of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and

(ii) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such entry except for those grounds of inadmissibility specified under paragraphs (14), (20), and (21) of section 212(a) [8 USCS § 1182(14), (20), (21)] which were a direct result of that fraud or misrepresentation.

(B) A waiver of deportation for fraud or misrepresentation granted under subparagraph (A) shall also operate to waive deportation based on the grounds of inadmissibility at entry described under subparagraph (A)(ii) directly resulting from such fraud or misrepresentation.

(2) The provisions of subsection (a)(11) as relate to a single offense of simple possession of 30 grams or less of marihuana may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in subsection (a)(19)) who—

(A) is the spouse or child of a citizen of the United States or of an alien lawfully admitted for permanent residence, or

(B) has a child who is a citizen of the United States or an alien lawfully admitted for permanent residence,

if it is established to the satisfaction of the Attorney General that the alien's deportation would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, or child of such alien and that such waiver would not be contrary to the national welfare, safety, or security of the United States.

(As amended Oct. 30, 1978, P. L. 95-549, Title I, § 103, 92 Stat. 2065; Dec. 29, 1981, P. L. 97-116, § 8, 95 Stat. 1616.)

U.S.C. § 1253

§ 1253. Countries to which aliens shall be deported; cost of deportation

(h)(1) Deportation. The Attorney General shall not deport or return any alien (other than an alien described in section 241(a)(19)) [8 USCS § 1251(a)(19)] to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

(2) Paragraph (1) shall not apply to any alien if the Attorney General determines that—

(A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; or

(D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.

(As amended Oct. 30, 1978, P. L. 95-549, Title I, § 104, 92 Stat. 2066; Mar. 17, 1980, P. L. 96-212, Title II, § 203 (e), 94 Stat. 107; Dec. 29, 1981, P. L. 97-116, § 18(i), 95 Stat. 1620.)

Federal Rules of Civil Procedure
Rule 26(e)

(e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

Rule 59(a)

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury,

for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

Federal Rules of Evidence

Rule 103.

RULINGS ON EVIDENCE

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

Rule 902.

SELF-AUTHENTICATION

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal. A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents. A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.

(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial paper and related documents. Commercial paper, signatures, thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions under Acts of Congress. Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.

Office - Supreme Court, U.S.
FILED
NOV [illegible] 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-414

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN DEMJANJUK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

ALLAN A. RYAN, JR.
Office of Special Investigations

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether there exists a constitutional right to a jury trial in denaturalization actions under 8 U.S.C. 1451(a).

2. Whether petitioner was entitled to recovery of all costs of litigation because this is a "Nazi collaborator denaturalization case."

3. Whether the district court correctly admitted into evidence certain identification evidence, deposition testimony, and foreign documents.

4. Whether the district court abused its discretion in not granting a new trial because certain statements were not turned over to petitioner before trial.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 3

Conclusion 10

TABLE OF AUTHORITIES

Cases:

Duignan v. *United States*, 274 U.S. 195 4

Fedorenko v. *United States*, 449 U.S. 490 ..... 2, 3, 4, 5

Johannessen v. *United States*, 225 U.S. 227 4

Kennedy v. *United States*, 372 U.S. 144 4

Knauer v. *United States*, 328 U.S. 654 4

Luria v. *United States*, 231 U.S. 9 4

Mathews v. *Eldridge*, 424 U.S. 319 5

Neil v. *Biggers*, 409 U.S. 188 6

Schneiderman v. *United States*, 320 U.S. 118 4

United States v. *Fedorenko*, 455 F. Supp. 893, rev'd on other grounds, 597 F.2d 946, aff'd, 449 U.S. 490 6

United States v. *Linnas*, 527 F. Supp. 426, aff'd, 685 F.2d 427 (2d Cir. 1982), cert. denied, No. 81-2336 (Oct. 4, 1982) 8

United States v. *Lovasco*, 431 U.S. 783 3-4

Page

Constitution, statutes and rules:

United States Constitution:

Article III 4

Fifth Amendment 4, 5

Sixth Amendment 4

Seventh Amendment 4

Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009 2

Displaced Persons Act, ch. 262, Section 13, 64 Stat. 227 2

8 U.S.C. 1427(a) 2

8 U.S.C. 1451(a) 1, 2, 4

Fed. R. Evid. :

Rule 902(3) 8

Rule 902(4) 8

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-414

JOHN DEMJANJUK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is reported at 680 F.2d 32. The opinion of the district court (Pet. App. A4-A57) is reported at 518 F. Supp. 1362.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1982. The petition for a writ of certiorari was filed on September 7, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States filed this action in the United States District Court for the Northern District of Ohio, seeking revocation of petitioner's citizenship under 8 U.S.C. 1451(a) on the grounds that he had been the operator of the gas chamber at the Nazi death camp at Treblinka in 1942 and

1943 and had concealed that fact both when he applied for an immigration visa in 1952 and when he applied for naturalization in 1958. The gravamen of the complaint was that petitioner's actions had rendered him ineligible for immigration to the United States under the Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009, and that his naturalization therefore was procured both illegally, because he had never lawfully entered the United States, and by concealment of a material fact.

After a full trial on the merits, the district court revoked petitioner's citizenship (Pet. App. A4-A57). The court found that petitioner had served at Trawniki, the Nazi training camp for concentration camp guards (*id.* at A11-A18), that he had been an armed guard at Treblinka in 1942 and 1943 (*id.* at A19-A35), and that he had concealed these facts from immigration officials (*id.* at A39-A42) and again from naturalization examiners (*id.* at A42-A43). The court held that, under *Fedorenko* v. *United States*, 449 U.S. 490 (1981), petitioner's "failure to disclose his service under the German SS at Trawniki and his later service as an armed guard at Treblinka were material misrepresentations under § § 2(b) and 10" of the Displaced Persons Act, and that, given petitioner's ineligibility for a visa, "his citizenship must be revoked as 'illegally procured' because he failed to satisfy a statutory prerequisite of naturalization" (Pet. App. A46-A47; footnote omitted).[1] Alternatively, the court held that petitioner's naturalization must be revoked under 8 U.S.C. 1451(a) because it was procured by concealment or

---

[1]The district court also held that petitioner was ineligible for a visa under Section 13 of the Displaced Persons Act, ch. 262, 64 Stat. 227, which rendered ineligible "any person who advocated or assisted in the persecution of any person because of race, religion, or national origin" (Pet. App. A47 n.43). In addition, the court held that petitioner "illegally procured his citizenship because he lacked the good moral character required" under 8 U.S.C. 1427(a) (Pet. App. A48 n.45).

misrepresentation of material facts (*id.* at A48-A50). The court denied petitioner's post-trial motion for a new trial based on the government's alleged failure to comply fully with certain pretrial discovery requests (*id.* at A51-A56).

The court of appeals affirmed (Pet. App. A1-A3). It concluded that "the District Court's findings of fact are not clearly erroneous under a 'clear and convincing' standard and the evidence [was] properly admitted" and that "[t]he District Court did not abuse its discretion in denying [petitioner's] motion for a new trial based on newly discovered evidence" (*id.* at A2).

ARGUMENT

As the district court recognized (Pet. App. A44-A45), this case is controlled by *Fedorenko* v. *United States*, 449 U.S. 490 (1981), which presented similar factual and legal issues. Petitioner does not suggest that the courts below erred in construing or applying *Fedorenko* nor does he dispute that the evidence, if properly admitted, satisfied the standard of "clear, unequivocal and convincing" evidence required of the government in denaturalization cases (*id.* at 505). Rather, petitioner claims that the district court erred in various procedural and evidentiary rulings. As demonstrated by the district court's extensive opinion (Pet. App. A4-A57), on which we primarily rely, these rulings were correct and do not warrant review by this Court.

1. Petitioner contends (Pet. 4-12) that he should have been granted a trial by jury in this denaturalization proceeding. We note at the outset that this issue was not properly raised in the court of appeals nor passed on by that court;[2] hence, it is not properly before this Court. See, e.g., *United*

---

[2]Following oral argument in the court of appeals, petitioner sought leave to file a supplemental brief to raise for the first time an objection to his failure to receive a jury trial. The court denied leave to file the brief.

States v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Duignan* v. *United States*, 274 U.S. 195, 200 (1927). In any event, the contention is without merit. We are aware of no case that has held that 8 U.S.C. 1451(a) requires a jury trial, and such a right cannot be derived from any of the constitutional provisions relied on by petitioner.

This Court has consistently recognized that "a denaturalization action is a suit in equity." *Fedorenko* v. *United States*, *supra*, 449 U.S. at 516; *Knauer* v. *United States*, 328 U.S. 654, 671 (1946). Accordingly, it is well established that the Seventh Amendment right of trial by jury does not apply. *Luria* v. *United States*, 231 U.S. 9, 27-28 (1913). Nor does petitioner have a right to jury trial under Article III or the Sixth Amendment, for a denaturalization suit is not a criminal prosecution. See, e.g., *Schneiderman* v. *United States*, 320 U.S. 118, 160 (1943).

Petitioner's reliance (Pet. 7-10) on *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963), is misplaced. There, the Court held unconstitutional a federal statute that provided for automatic "forefeiture of citizenship [as] a penalty for the act of leaving or staying outside the county to avoid the draft." The Court ruled that the penalty could not be imposed without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments. *Id.* at 165-167. Here, however, petitioner's denaturalization is not a criminal penalty, but rather the logical consequence of a finding that his citizenship was never properly obtained in the first place. Denaturalization in this context thus operates primarily to undo, rather than punish, an illegal act, and the Sixth Amendment provides no basis for finding a right to a jury trial. See *Johannessen* v. *United States*, 225 U.S. 227, 242 (1912).

Finally, the Fifth Amendment contains no derivative right to trial by jury in civil denaturalization cases. Petitioner's claim (Pet. 5-6) that such a right should be created under the test of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), is without merit. While petitioner's private interest in retaining his citizenship is admittedly substantial, there is no greater risk of an "erroneous deprivation" of that interest if the matter is tried by the court rather than a jury. As this Court has recognized, the substantial interest in retaining citizenship is adequately protected by imposing on the government a stringent burden of proving its case by clear, convincing and unequivocal evidence. *Fedorenko* v. *United States, supra*, 449 U.S. at 505.

2. Petitioner asserts (Pet. 13-16) that he was entitled to all costs of litigation because defendants in what he characterizes as "Nazi collaborator" suits should have a special entitlement to apparently unlimited expenses for investigation and trial. The court of appeals correctly concluded, however, that "nothing in the due process clause nor the facts of this case * * * require[s] a generalized award of fees and expenses to [petitioner's] counsel" (Pet. App. A3). Moreover, as the court of appeals noted (*ibid.*), petitioner "was never denied any specific request for necessary expenditures by the District Court," and, indeed, the district court conditioned the deposition of witnesses in West Germany on petitioner's counsel's ability to attend at government expense.

3.a. Petitioner contends (Pet. 16-18) that the district court erred in admitting videotaped depositions of two German citizens, Horn and Schaefer, and one American citizen, Segat. This contention is insubstantial. First, each of these witnesses was beyond the subpoena power of the court and thus exclusion of the deposition testimony would have meant that their testimony would be unavailable to the

court.[3] Second, defense counsel was present at the depositions and cross-examined the witnesses; indeed, as noted above, he attended the German depositions at government expense. Finally, petitioner does not suggest how he could have been prejudiced by admission of the testimony through deposition, rather than at trial. Petitioner himself was free to attend the depositions but chose not to do so; accordingly, he cannot now claim (see Pet. 17) that the witnesses did not "confront" him.

b. Petitioner argues (Pet. 29-30) that the photospreads shown to survivors of Treblinka for identification purposes were unduly suggestive. This fact-bound claim does not merit further review. The district court considered this issue carefully and explained its conclusions in detail (see Pet. App. A24-A25). The court correctly applied this Court's analysis in *Neil* v. *Biggers*, 409 U.S. 188, 199-200 (1972), and held that, although "the length of time between the events in question and the witness identifications is an extraordinary 34-35 years" (Pet. App. A31), the other factors enumerated in *Biggers*, including the certainty of identification (*id.* at A32), the "ample opportunity" to view petitioner at Treblinka (*id.* at A33), and the accuracy of the witnesses' prior descriptions (*id.* at A34), rendered the identifications reliable (*id.* at A35).[4]

---

[3]This is surely true of the two German witnesses, who refused to travel to the United States. Segat was out of the United States during the trial and thus his testimony could have been secured only at considerable inconvenience to the court's scheduling.

[4]Petitioner points out (Pet. 29 n.24) that the photospread in this case was held to be unduly suggestive by the district court in *United States* v. *Fedorenko*, 455 F. Supp. 893 (S.D. Fla. 1978), rev'd on other grounds, 597 F. 2d 946 (5th Cir. 1979), aff'd, 449 U.S. 490 (1981). That conclusion, of course, was directed at the photograph of Fedorenko, not of petitioner. In any event, the government challenged on appeal in *Fedorenko* the district court's ruling on this issue, but the court of appeals, reversing on other grounds, did not reach the question, and it was not presented to this Court.

There is no merit to petitioner's related claim (Pet. 27-28) that the district court should have allowed his "expert" witness to testify with respect to this question. Judges are fully capable of deciding the reliability and admissibility of photospread identifications based on the testimony of the witnesses themselves and "an examination of all the factual circumstances" (Pet. App. A35). The court here acted well within its discretion in declining the advice of an "expert" on these matters.

Petitioner's claim (Pet. 22-27) that his attorney should have been present when the photospreads were shown to witnesses prior to trial is also without merit. The district court correctly held that decisions of this Court give no such right to defendants even in criminal cases (Pet. App. A29), and that, particularly in light of the "rigorous cross-examination of all six witnesses concerning the pretrial identification in this case" (*ibid.*), no exception to this rule was required here.[5]

c. Petitioner advances several arguments against the admissibility of the Trawniki ID card (Pet. 18-22). These points were considered in detail and rejected by the district court (Pet. App. A11-A18). The court found that the card was "authentic and clearly show[s] that [petitioner] was at the German SS training camp of Trawniki" (*id.* at A17; footnote omitted). The court noted that "at no time during the entire course of the trial was *any* evidence introduced to substantiate [the] speculations" of petitioner, renewed here, that the document was a forgery (*id.* at A12; emphasis in

---

[5]Petitioner's contention (Pet. 24-25) that an exception is required because the government has a special office concerned with proceedings against Nazi war criminals is frivolous. By the same token, the fact that some identifications were overseen in Israel by Israeli investigators (Pet. 26-27) is irrelevant; regardless of what Israeli practice might be, such identifications must pass muster under American standards, and the district court held that they did (Pet. App. A35).

original). Petitioner claims (Pet. 21) that the Soviet government "did * * * not permit any testing upon the original [Trawniki ID card] to determine its date of origin," but the district court specifically noted (Pet. App. A17 n.13) that "the original card was made available to [petitioner] for the purpose of expert documents analysis [but] no such analysis was conducted."

Nor is there any substance to petitioner's claim that the document must somehow be deemed inherently untrustworthy because the Soviet Union, which made the card available from its World War II archives, is "our most severe critic" (Pet. 21) in international affairs. The document was offered and accepted under Rule 902(3) and (4) of the Federal Rules of Evidence (see Pet. App. A11), which provides detailed procedures for the admission of foreign public documents and certified copies of public records, and the district court gave detailed consideration to the question of its admissibility and reliability (*id.* at A11-A18). The fact that the document was supplied by the Soviet Union does not prevent its use in an American court. See *United States* v. *Linnas*, 527 F. Supp. 426, 433-434 (E.D. N.Y. 1981), aff'd, 685 F.2d 427 (2d Cir. 1982), cert. denied, No. 81-2336 (Oct. 4, 1982).

4. Petitioner's contention (Pet. 31-37) that the district court abused its discretion in failing to grant a new trial is without merit.

a. Petitioner first contends (Pet. 31-35) that the prosecution had an obligation to produce before trial an affidavit of Chaim Sztajer, a survivor of Treblinka now living in Australia, that was executed in September 1980. The district court correctly rejected this claim as "specious" (Pet. App. A56). In May 1980, the government provided petitioner with Sztajer's name and address in response to petitioner's

interrogatories requesting the names and addresses of persons who had failed to identify petitioner's photograph in a photospread. Petitioner did not request any statements of Sztajer or the other persons named by the government in response to the interrogatories, and indeed made no effort even to contact Sztajer or the other persons.[6] The district court correctly held that petitioner's "lack of diligence in pursuing information * * * should not be visited upon the Government" by requiring a new trial (*ibid.*).

b. Shortly before trial, the government received from the Soviet Union statements of five persons who had been present at Trawniki. Only one of these persons, Nikolai Dorofeev, recalled petitioner; Dorofeev also identified petitioner's photograph. The government inadvertently did not forward these statements to petitioner until after trial. The district court held that the government should have produced Dorofeev's statement upon receipt (Pet. App. A53), but that the failure to produce this statement (or the other statements) did not justify granting a new trial (*id.* at A51-A55). The claimed relevance of the statements, the court noted, was in establishing the authenticity of petitioner's identification card from Trawniki, and, in this respect, the statements "tend[ed] to corroborate" the government's case (*id.* at A54).

Petitioner contends (Pet. 35-37) that the court erred in refusing to grant a new trial because of the government's omission. He admits that the Soviet officials who took the statements did not even show a Trawniki ID card to the five persons (Pet. 36), but nonetheless claims that his knowledge of the existence of these witnesses would have shed light on the "fire of controversy" (*ibid.*) allegedly surrounding the card. But, as the district court pointed out, the authenticity

---

[6]Sztajer was not a witness at trial.

of the card had "not been impugned by even a scintilla of evidence" at trial (Pet. App. A55). Moreover, the statements in question were "cumulative and not of such character that would probably produce a different result on a new trial" (*ibid.*; footnote omitted). Thus, the court of appeals correctly held (*id.* at A2-A3) that the district court did not abuse its discretion in denying petitioner's motion for a new trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

ALLAN A. RYAN, JR.
Director
Office of Special Investigations

NOVEMBER 1982

DOJ-1982-11